



Administrative Tribunal

Distr.
LIMITED

AT/DEC/977
17 November 2000

ENGLISH
ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 977

Case No. 1080: JOHNSTON

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Hubert Thierry, President; Mr. Kevin Haugh; Ms. Marsha A. Echols;

Whereas, on 3 May 1999, Susanna H. Johnston, a staff member of the United Nations, filed an application containing pleas which read as follows:

"7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

- (c) *To decide* to hold oral proceedings on the present application in accordance with article 8 of its Statute and chapter IV of its Rules;
- (d) *To order* the Office of Internal Oversight to produce its files on the Applicant's case.

8. On the merits, the Applicant respectfully requests the Tribunal:

- (a) *To rescind* the decision of the Secretary-General imposing the disciplinary penalty of demotion to the P-4 level with no possibility of promotion for three years;

- (b) *To order* that the Applicant be reinstated to her former grade and step with retroactive effect from February 1999;
- (c) *To find and rule* that the Joint Disciplinary Committee erred in matters of fact and law and that its recommendation as well as the resulting decision of the Secretary-General were tainted by prejudice and other extraneous considerations;
- (d) *To find and rule* that the manner in which the Respondent conducted his initial investigation and subsequent disciplinary review were procedurally flawed, tainted by extraneous considerations and repeatedly violated the Applicant's rights to due process;
- (e) *To award* the Applicant compensation in the amount of three years net base pay for the damage to her career and reputation and for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;
- (f) *To fix* pursuant to article 9, paragraph 1 of the Statute and Rules [of the Tribunal], the amount of compensation to be paid in lieu of specific performance at three year's net base pay in view of the special circumstances of the case;
- (g) *To award* the Applicant as cost, the sum of \$5,000 in legal costs and \$500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 5 January 2000;

Whereas the Applicant filed written observations on 20 August 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of the World Health Organization, New York Liaison Office, on 1 July 1968, as a Clerk/Typist on a fixed-term contract, at the G-3 level. Effective 30 June 1972, the Applicant was granted a fixed-term appointment and transferred to the Office of Conference Services at Headquarters with the functional title of Editorial Assistant. She was promoted to the G-4 level on 1 April 1973. Effective 1 April 1975, she was promoted to the G-5 level and granted permanent status on 1 March 1976.

After successfully passing the 1980 Competitive Examination for Promotion to the Professional category of staff members from other categories, the Applicant was appointed as Associate Administrative Officer, Stenographic Section, Editorial and Official Records Division, Department of Conference Services at the P-2 level. On 16 May 1983, she was reassigned to the Distribution Section, Publishing Division, and on 1 April 1984, she was promoted to the P-3 level. Effective 6 August 1987, she was appointed Deputy Chief of the Sales Section of the Publishing Division, and subsequently on 23 June 1990, she became Chief of the Sales Section. On 1 October 1991, she was promoted to the P-5 level.

As part of the United Nations 50th Anniversary Celebration (UN50), in 1995, the Applicant's Sales Section was assigned the responsibility to arrange for the marketing of commemorative souvenir items and to design and produce a sales brochure. Included in its duties, the Sales Section was requested to make initial contact with vendors, in order to find the lowest acceptable contract bidders, oversee the contracts and certify any required payments.

On 26 October 1994, six vendors were approached and asked for quotes for the production of 50th Anniversary gift item sales brochures. One of the vendors contacted was a company known as "Art Around the Clock" (AAC), a New York Corporation, whose president was Robert Versandi.

On 18 November 1994, AAC signed a contract with the United Nations to design and prepare artwork for and print one hundred thousand copies of a brochure for UN50 sales items. AAC was paid for its work the sum of \$14,275. Subsequently, on 4 April 1995, AAC entered into another contract with the United Nations for an additional 120,000 brochures on the same subject for a payment of \$19,335. On 16 August 1995, AAC was engaged to produce 100,000 copies of another brochure for a payment of \$25,950.

On 13 October 1997, the Investigation Section, Office of Internal Oversight Services (OIOS) issued a report of an investigation which revealed that the Applicant had played an active role in organizing and awarding the three contracts with a total value of \$59,560 to AAC, the company owned by Mr. Versandi, who, the investigator discovered, was her "boyfriend". The report also stated that on 1 November 1994, she filed AAC's certificate of incorporation with the State of New York using her own name and home address as the Company's business address, and that the Applicant was named in the contracts as the party to receive copies of any required written notices.

The report concluded that the Applicant's association with the company and her role in the award and administration of the contracts was a conflict of interest in direct contravention of staff rule 101.6. It was recommended that disciplinary action be taken and that she be summarily dismissed.

On the same day, the Under-Secretary-General, OIOS, sent the report to the Assistant Secretary-General, Department of Public Information (DPI), indicating that the evidence confirmed the findings of the investigation. On 21 October 1997, the Assistant Secretary-General, DPI, suggested that the case be referred to the Office of Human Resources Management (OHRM) for appropriate action.

On 9 March 1998, the Director, Specialist Services Division, OHRM, informed the Applicant of the charges, requested her to submit a written explanation and advised her of her right to counsel.

On 8 and 14 April 1998, the Applicant submitted her responses to the allegations of misconduct, as requested.

On 14 July 1998, the Applicant was notified that her case would be submitted to the Joint Disciplinary Committee (JDC).

The JDC submitted its report on 6 January 1999. Its conclusion and recommendations read as follows:

Conclusion

69. The Panel was of the undivided opinion that [the Applicant] was given a position of special trust as Chief of UN's Sales Section, and she used that position to influence the decision to award the UN50 contracts to AAC, a company owned by her friend, and with the management of which she was actively associated. This conduct violated staff rule 101.6 (b), fell short of the standard of conduct expected of an international civil servant, and amounts to serious misconduct warranting disciplinary sanction.

Recommendations

70. In light of the foregoing, the Panel *unanimously recommended* that [the Applicant] be demoted to the P-4 level without the possibility of promotion for a period of three years.

71. The Panel was of the view that due to the serious nature of [the Applicant]'s misconduct, and the fact that she breached the trust of the Organization, she should not

continue to serve as the Chief of the Sales Section, and in the future, she should not be given any post with certification authority."

On 4 February 1999, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her as follows:

"...

The Secretary-General has examined your case in the light of the Committee's report. He has taken note that the Committee first addressed the procedural issues you raised and found no violations of due process that would vitiate disciplinary proceedings against you. The Secretary-General thus considers that due process requirements have been duly observed by the Administration in your case.

The Secretary-General has taken note of the Committees's reasoning that, in order to establish that your conduct violated staff rule 101.6 (b), it must be ascertained that you were actively associated with the management of AAC and that it was possible for you to benefit from your association with AAC by reason of your position as Chief of the UN's Sales Section. The Committee found that cumulative evidence exists pointing to the fact that you were actively associated with the management of AAC. The Committee also found that it was possible for you to benefit from your association with AAC by recommending to the UN50 Secretariat that AAC be included in the bids and subsequently be awarded the contracts for the production of the UN50 promotional sales brochures.

The Secretary-General has further taken note of the Committee's undivided opinion that you were given a position of special trust as Chief of the UN's Sales Section and that you used that position to influence the decision to award the contracts to AAC, a company owned by your friend and with the management of which you were actively associated. The Committee therefore concluded that your conduct violated staff rule 101.6 (b), fell short of the standard of conduct expected of an international civil servant and amounts to serious misconduct warranting disciplinary action.

The Secretary-General ... is in agreement with those findings and conclusion. He also considers that your conduct violated in particular paragraph 4 of the Report on the Standards of Conduct in the International Civil Service.

... in accordance with the unanimous recommendation of the Committee, the Secretary-General has decided that you be demoted to the P-4 level, with effect from close of business on the day you receive this letter, and with no possibility for promotion for three years. The Secretary-General has also decided that, after the three years have elapsed, you

would be entitled to the same consideration for promotion as other staff members in accordance with the relevant Staff Regulations and Rules and administrative issuances.

The Secretary-General has also taken note of the Committee's suggestions that you should not continue to serve as the Chief of the Sales Section and, in the future, you should not be given any post with certification authority. The Secretary-General considers that those suggestions fall outside the Committee's mandate as they are not a recommendation for a disciplinary measure within the scope of chapter X of the Staff Regulations and Rules.

...

On 3 May 1999, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The conclusions reached by the JDC are unsupported by credible evidence.
2. The JDC erred as a matter of law in its interpretation of the burden of proof in disciplinary proceedings.
3. The JDC erred on matters of fact and procedure crucial to the Respondent's case.
4. The JDC proceedings were tainted by procedural irregularities.
5. The discretionary authority of the Secretary-General in dismissing the Applicant for misconduct was applied in an arbitrary and capricious manner.

Whereas the Respondent's principal contentions are:

1. The Applicant failed to meet the standards of conduct required of staff members and international civil servants.
2. The Applicant's due process rights were fully respected.
3. There has not been any substantive irregularity in the Applicant's case.
4. The Applicant's case was properly assessed and was not influenced by any extraneous considerations.

The Tribunal, having deliberated from 2 to 17 November 2000, now pronounces the following judgement:

I. The Applicant's career with the United Nations has been outstanding and characterized by rapid promotions. Originally recruited by the World Health Organization in July 1968 as a G-3 clerk, she was appointed in 1990 to the important post of Chief of the Sales Section of the United Nations and in 1991 was promoted to the P-5 level. In 1999, however, the Applicant was subjected to a penalty which, while not extremely serious (as would have been dismissal), nonetheless is a major blemish on her professional record. By decision of the Secretary-General dated 4 February 1999, she was demoted to P-4 without possibility for promotion for three years. The Secretary-General however specified that, following that period, she would fully recover her right to be considered for promotion.

This penalty was imposed on the basis of a report by the OIOS, whose purpose is to assist the Secretary-General in fulfilling his responsibilities in respect of the use of the Organization's resources, and also on the basis of a recommendation adopted unanimously by the JDC.

The failings of which the Applicant was accused, and which were considered to constitute serious misconduct and violations of staff rule 101.6 (b) and staff regulation 1.4, relate to her role as Chief of the Sales Section in the awarding of contracts to the corporation "Art Around the Clock", whose president was her personal friend, for the publication of a brochure relating to items for sale on the occasion of the fiftieth anniversary of the United Nations.

The conclusion of the JDC on this subject, which was approved by the Secretary-General, was as follows:

"69. The Panel was of the undivided opinion that [the Applicant] was given a position of special trust as Chief of UN's Sales Section, and she used that position to influence the decision to award the UN50 contracts to AAC, a company owned by her friend, and with the management of which she was actively associated. This conduct violated staff rule 101.6 (b), fell short of the standard of conduct expected of an international civil servant, and amounts to serious misconduct warranting disciplinary sanction."

The Applicant is appealing against the decision of the Secretary-General, requesting that it be rescinded and that she be reinstated in the P-5 level and awarded substantial compensation.

The Secretary-General has considerable discretionary authority in disciplinary matters; the Tribunal, whose competence in this area has recently been defined (Judgement No. 941, *Kiwanuka*

(1999)), may rule on the legality of the penalty but not on its appropriateness. The Tribunal will therefore consider the process whereby the penalty was adopted and will also verify whether the Secretary-General could consider that the facts constituted violations of staff rule 101.6 (b) and staff regulation 1.4.

II. The Applicant has not produced any proof, or even *prima facie* evidence, of discrimination against her, even though it may be said that the OIOS was somewhat overzealous, as reflected in its recommendation that the Applicant should be immediately dismissed; that recommendation was not followed by either the JDC or the Secretary-General. Nor is there any proof or *prima facie* evidence that the penalty was motivated by extraneous factors.

There were, however, certain irregularities in the process which led to the penalty, particularly on the part of the OIOS. For example, the OIOS relied on a record of a conversation with the Applicant although it had been neither submitted to nor signed by her, and its final report also was not transmitted to her before being submitted to a higher authority. The confidentiality of the work of the OIOS was breached when information concerning the Applicant was published in the press. Lastly, it would seem that there is room for debate regarding the documents which were submitted to the JDC and that the Committee might have wished to hear witnesses - although it is not strictly obliged to do so - whereas in this case it did not.

These flaws are regrettable, and the Tribunal attaches the greatest importance to strict observance of procedures, particularly where their purpose is to protect the rights of United Nations staff members. However, the Tribunal does not consider that the proceedings in this case were vitiated by substantial errors, omissions or failings of a sufficiently serious nature as to render them void; the JDC carried out a thorough examination of the facts and produced a 15-page report, and - most importantly - the Applicant, accompanied by Counsel, appeared before the Committee and was given every opportunity to answer the accusations against her.

III. In reaching an opinion as to the legality of the penalty, it is not for the Tribunal to say whether it was justified (provided that it was not disproportionate) but only whether the penalty was compatible with the provisions under which it was imposed.

Staff rule 101.6 (b) states:

"No staff member may be actively associated with the management of, or hold a financial interest in, any business concern if it were possible for the staff member to benefit from such association or financial interest by reason of his or her official position with the United Nations."

To fail to perform his or her obligations, therefore, it suffices that a staff member should have been associated with the management of a business concern if he or she might benefit from such association by reason of his or her official position with the United Nations.

In this regard, it has not been denied:

- (1) That the president of "Art Around the Clock" was a friend of the Applicant; or
- (2) That the Applicant has, at least on certain occasions, rendered assistance to the management of "Art Around the Clock", for example by arranging for the company to be incorporated with the New York State authorities and by giving her address for correspondence resulting from that incorporation;
- (3) That as Chief of the Sales Section she contributed to the award of contracts to "Art Around the Clock", without disclosing - and the Tribunal considers this to be an important point - her relationship with the president of the company who, incidentally, is also its owner.

The Tribunal considers that there is no legal reason why the Secretary-General should not have considered these facts as constituting breaches of staff rule 101.6 (b).

Attention should also be drawn to staff regulation 1.4, which provides that:

"Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status, or on the integrity, independence and impartiality which are required by that status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status."

In this instance, this provision is no less important than staff rule 101.6 (b). Thus, it was legitimate for the Secretary-General to consider that the penalty he had decided to impose was, given all the circumstances, appropriate in the light of the Applicant's failure to display the prudence expected of her in the exercise of an important responsibility involving United Nations funds.

The Tribunal therefore considers that, as regards both the procedure which led to its adoption and the statutory provisions, the penalty imposed on the Applicant cannot be considered legally unfounded.

IV. For the above reasons, the Tribunal rejects the application.

(Signatures)

Hubert THIERRY
President

Kevin HAUGH
Member
\\

Marsha A. ECHOLS
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary



Administrative Tribunal

Distr.
LIMITED

AT/DEC/978
17 November 2000

ENGLISH
ORIGINAL: FRENCH

ADMISTRATIVE TRIBUNAL

Judgement No. 978

Case No. 1086: AFAWUBO

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President;

Ms. Marsha A. Echols;

Whereas, on 8 June 1999, Mensah Novito Afawubo, a staff member of the Office of the United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR), filed an application containing pleas which read as follows:

“10. (a) Pursuant to article 9, paragraph 1 of the Statute of the United Nations Administrative Tribunal (UNAT), and in conformity with article 7 of the UNAT's Rules, I am hereby referring to the Tribunal, for its judgement and ruling, my disagreement with the conclusions reached by the Geneva Joint Appeals Board (JAB) in respect of my appeal to it regarding the failure by UNHCR's Appointments, Promotions and Postings Board (APPB) to recommend me, at its 1995 annual regular and Recourse sessions, for promotion, on the one hand, and for the granting of a Longer Fixed-Term Appointment (LFTA), on the other.

(b) The administrative decisions being contested by me in that respect are those carried by Inter-Office Memorandum/39/95 – Field Office Memorandum/38/95 (IOM/39/95 – FOM/38/95) of 16 June 1995 and Inter-Office Memorandum/77/95 – Field Office Memorandum/79/95 (IOM/77/95 – FOM/79/95) of 6 November 1995,

both signed by the United Nations High Commissioner for Refugees following, respectively, the annual regular session and the Recourse session of the APPB, and both of which I considered invalid with respect to me because they *unjustifiably* denied me the said promotion and a LFTA since the grounds and arguments advanced for such denial were completely invalid, considering that I had fully met the criteria for being promoted and granted a LFTA, as will be demonstrated in detail ..., whilst the APPB claimed the contrary.

11. In view of that injustice to me, therefore, I request reparation as follows:

- (i) Regularization by promotion to the P-3/L-3 level with retroactive effect from 1995, the year of that injustice;
- (ii) Corresponding retroactive adjustments of salary and other financial entitlements, as well as of seniority-in-grade;
- (iii) Retroactive regularization of my contractual status as appropriate to my then seniority, not excluding the granting of an Indefinite Appointment, the criteria for which (being in my eleventh year with UNHCR in 1995) I had largely fulfilled, just like my other colleagues who were then granted that appointment for having accomplished more than five years of uninterrupted service;
- (iv) Damages for the prejudice caused to my career development by such injustice – the amount of which I leave it up to the Tribunal to fix."

Whereas the Respondent filed his answer on 11 July 2000;

Whereas the Applicant filed written observations on 30 August 2000;

Whereas the facts in the case are as follows.

The Applicant entered the service of UNHCR in Lome, Togo, on 1 June 1984, on a three-month fixed-term appointment as Senior Administrative Assistant at the GL-8 level. He served under a series of short-term contracts until 1 May 1985, when he was granted a fixed-term appointment of one-year. Effective 1 January 1986, his status changed from Local General Service to National Professional Officer and he was promoted to Assistant Administrative Officer. On 16 January 1989, the Applicant was reassigned to Yaounde, Cameroon, as Associate Program Officer with a special post allowance at the P-2 level. On 1 January 1990, he received a one-year intermediate-term appointment at the L-1 level as Associate Protection Officer in Aware, Ethiopia, and on 1 July 1991, his appointment was

extended and he was promoted to the L-2 level. He was subsequently reassigned to Djibouti as Associate Programme Officer on 16 November 1991, and to Conakry, Guinea as Programme Officer on 1 September 1992. Effective 31 December 1993, the Applicant's post was discontinued but nevertheless his contract was extended for two months on 1 January 1994. On 1 March 1994, his title was changed to Associate Officer and on 21 March 1994, he went on mission to Bangui, Central African Republic (CAR). He was officially reassigned to Bangui as Senior Programme Officer with a special post allowance to the L-3 level on 1 August 1994. His status was converted from intermediate fixed-term to long-term for one year effective 1 January 1995.

In a memorandum to the Appointments, Promotions and Postings Board (APPB), UNHCR, dated 3 March 1994, the UNHCR Representative, CAR, recommended that the Applicant be promoted to "at least" the P-3/L-3 level, and be granted an Indefinite or Longer Term appointment, and converted from Project Personnel (L) to the Professional (P) category. Following the annual session of the APPB in March, on 20 June 1995, the High Commissioner circulated a memorandum entitled "1995 Promotions in the Professional, Project Personnel (L) and National Professional Officer Categories and the Granting of Indefinite Appointments in the Professional and National Professional Officer Categories". The Applicant was not included in this list.

In accordance with the recourse procedures of the APPB regulations, the Applicant wrote to the Secretary, APPB, on 28 June 1995, requesting an explanation as to why he had not been promoted, converted to the P category or had his contractual status reviewed. He requested all written information pertaining to the Board's review of his case. On 7 July 1995, the Secretary, APPB, replied enclosing a copy of the documentation submitted to the APPB and explaining that "the Board carefully reviewed [the Applicant's] case ... but was unable to retain [his] name because the evaluation of his performance on file did not sufficiently demonstrate [his] ability to discharge effectively responsibilities at the P-3 level". On 14 August 1995, the Applicant wrote to the Secretary, APPB, requesting recourse. He drew attention to his positive evaluations and performance in positions at the P-3, L-3 and P-4 levels,

enclosed his performance evaluation report of 13 March 1995 (in which he was rated as "very good" but which the APPB had not received prior to its regular session) and a Personnel Action Form converting his status from intermediate-term to long-term effective 1 January 1995.

In October 1995, the APPB met to review recourses submitted by staff members following its regular session. On 6 November 1995, the High Commissioner circulated a memorandum entitled "1995 Promotions and Granting of Indefinite Appointments in the Professional Category" which contained his decisions following the recommendations of the APPB at its recourse session. Again, the Applicant was not included in the list. On 10 November 1995, the Secretary, APPB, advised the Applicant that the APPB had reviewed his recourse during its October session but "regretfully concluded that, in the context of APPB Regulation 39, it contained no new elements which would allow [the APPB] to undertake a substantive review of its previous recommendation to the High Commissioner".

On 24 November 1995, the Applicant wrote to the Secretary-General requesting administrative review of the High Commissioner's decision not to promote him or grant him a Longer Fixed-Term Appointment (LFTA).

On 27 November 1995, the Department of Human Resources Management advised the Staff Administrative Support service that "the APPB agreed that the appointments of staff members at the P/L-1 to D-1/L-6 level who have not benefited from the award of an indefinite appointment and have completed five years of uninterrupted service with UNHCR with a contract expiring before July 1996, be administratively extended". Effective 1 January 1996, the Applicant was granted a LFTA for three years.

On 17 January 1996, the Administrative Law Unit advised the Applicant that his request for administrative review had been received on 19 December 1995.

On 27 February 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 20 November 1998. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations

56., the Panel **concludes** first that the Appellant's right to a Longer Fixed-Term Appointment was fully respected. Therefore, the Panel rejects the Appellant's contentions as far as they relate to the LFTA.

57. The Panel, while recognizing the good performance of the Appellant as a staff member, further **concludes** that there are no grounds for sustaining that the process leading to the decision not to promote the Appellant was vitiated by procedural flaws or any improper motivation.

58. Accordingly, the Panel makes **no recommendation** in support of this appeal."

On 1 January 1999, the Applicant's contract was extended for five years, and on 1 January 2000, he received an indefinite appointment.

On 22 March 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General has examined your case in the light of the Board's report. With regard to your claim concerning the granting of a LFTA, the Secretary-General has taken note of the Board's finding that this part of your appeal is moot as you were granted, effective 1 January 1996, a LFTA for a period of three years. With regard to your claim concerning your non-promotion, the Secretary-General has taken note of the Board's findings that all relevant rules, regulations and due process requirements had been observed in your case, and that there was no evidence in support of your claim that the APPB's recommendation was flawed in that it failed to give consideration to all the facts before it or that the APPB was improperly motivated when it did not recommend you for promotion. The Secretary-General is in agreement with the Board's findings. He has therefore decided to accept the Board's unanimous recommendation and to take no further action on your case.

..."

On 8 June 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was wrongfully denied promotion to P3/L3 level and a LFTA by the APPB which failed to fairly consider the evidence presented before it on his behalf.
2. The JAB refused and failed to review the evidence in support of the Applicant's claims and improperly upheld the decision of the APPB.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion but only to consideration for promotion. The Applicant was properly considered for promotion, and his rights were not violated by his non-promotion.
2. The appeal against the decision not to grant the Applicant a LFTA is moot.

The Tribunal, having deliberated from 26 October to 17 November 2000, now pronounces the following judgement:

- I. The Applicant, who entered the service of UNHCR in 1984, carried out a number of missions in Cameroon, Ethiopia and the Central African Republic, first under intermediate-term appointments and then, beginning in 1995, under a longer-term appointment. In 1995, his superior at the UNHCR office in Bangui proposed that the APPB should grant the Applicant an indefinite appointment or a longer fixed-term appointment and promote him to the P-3/L-3 level.

The Board did not specify which type of appointment should be granted to the Applicant, but it refused to promote him, explaining its decision by stating that the Applicant's performance evaluation did not sufficiently demonstrate his ability to discharge effectively responsibilities at the P-3 level. The Applicant then challenged what appeared to him to be a refusal to grant him a long-term appointment and the refusal to promote him to the P-3/L-3 level. As the High Commissioner, following the recommendation of the JAB, did not accede

to his request, the Applicant requested the Tribunal to take a decision on the two points mentioned above: (1) the refusal to grant him a long-term appointment and (2) the refusal to promote him.

II. On the first point, the JAB, and subsequently the High Commissioner and the Respondent in the present case, considered that the Applicant's claim was moot. In fact, the Applicant was given a long-term appointment following the session of the APPB, which did not take any decision with regard to the nature of his appointment, but expressed the view that all staff members who had completed five years' service but had not been awarded indefinite appointments should be given three-year contracts. Forty-six UNHCR staff members were in this position, including the Applicant, who, in receiving a three-year appointment, was treated in the same manner as his colleagues who were in the same situation. Moreover, the Applicant's new contract took effect on 1 January 1996, the expiration date of his preceding appointment, so that the Applicant was never deprived of employment. It may therefore be considered that the Applicant's request concerning the refusal to grant him a long-term contract is moot because he received satisfaction at the appropriate time and, in fact, was never refused such an appointment, since the APPB did not take any decisions on individual cases.

III. On the second point, namely, the refusal to promote the Applicant, it may be allowed that the grounds invoked by the APPB, to the effect that a review of the Applicant's performance had not sufficiently demonstrated his ability to discharge effectively responsibilities at the P-3 level, were expressed too succinctly. In this connection, the Tribunal associates itself with the view expressed by the JAB, in a "special remark" appended to its recommendation, that the APPB should provide clearer reasons for its decision. It is understandable that the Applicant, on the basis of his performance evaluations and the length of his service with UNHCR, should have legitimately expected a promotion, and it is true that he was not undeserving of such a promotion.

Nonetheless, these considerations do not permit the Tribunal to deviate from its consistent and often-recalled position, in its case law, that neither length nor quality of service creates an entitlement to an automatic promotion, insofar as the Administration has discretionary power in this area, provided that the applicant himself has not proved the existence of discrimination or motives other than the interests of the service. This is not the case in the present instance (Judgement No. 941, *Kiwanuka* (1999)).

The Tribunal is therefore legally bound to reject the application, despite the insufficient explanation of the reasons for not promoting the Applicant and the sympathy which the Applicant appears to deserve.

IV. For these reasons, the Tribunal rejects the application.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Marsha A. ECHOLS
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary



Administrative Tribunal

Distr.
LIMITED

AT/DEC/979
17 November 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 979

Case No. 1090: AL-HAFIZ

**Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestine Refugees
in the Near East**

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Chittharanjan Felix

Amerasinghe; Mr. Kevin Haugh;

Whereas, on 15 March 1999, Saber Saleh Abd Al-Hafiz, a former staff member of the staff members of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 6 July 1999, the Applicant, after making the necessary corrections, again filed an application containing pleas which read, in part, as follows:

"...

I am requesting payment of all monies due to me since my services were terminated on 27 November 1997 to date of reinstatement, together with all the benefits, holidays and annual increments to which I would have been entitled during that period. I am further requesting legal expenses of US\$ 50,000.

The decision I seek is my reinstatement to my former post, the annulment of the decision to terminate my services and of all the reprimands with which I was served. Punitive measures should be taken against the Director of UNRWA Operations, Jordan, the Irbid Area Health Officer ... and the Irbid Area Officer ...

The termination of my services with UNRWA has cast a slur on my reputation. As a result, the number of patients visiting my private clinic has fallen sharply, as has my income. My mental health has been adversely affected, as has the health of my wife and children. My wife and I are still receiving psychiatric treatment. I am therefore seeking the sum of \$1 million in compensation."

Whereas the Respondent filed his answer on 28 February 2000;

Whereas the Applicant filed written observations on 22 April 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 17 November 1994 as an Area staff member at the Irbid Specialized Clinic, Jordan, on a temporary indefinite appointment as Ophthalmologist, grade 15. On 1 January 1996, the Applicant was promoted to grade 16. He was separated from service on 27 November 1997.

Commencing in January 1996, the Applicant was involved in a series of incidents and problems involving not only his superiors but his fellow employees as well, culminating in a letter of censure from the Field Administration Officer, Jordan, dated 16 September 1996, salary increment deferrals on 15 December 1996 and 10 April 1997, as well as suspension without pay in March 1997, an additional letter of censure from the Officer-in-Charge, Administration Department, Jordan, dated 27 March 1997, and threats of further disciplinary action unless his performance improved.

In a letter dated 22 September 1997, the Area Health Officer inquired about the Applicant's absence on sick leave on 13 September 1997 noting that the Applicant had attended and treated his private patients at his own clinic on that day. The Applicant's explanation was that he had been visiting his personal physician whose office was located in the same building.

On 6 October 1997, the Chief, Field Health Programme, requested the Deputy Chief, Field Health Programme and the Field Family Health Officer, Jordan, to investigate the matter. On 6 November 1997, after the completion of the investigation, they concluded that the Applicant had tried to mislead the Agency and that his absence on 13 September 1997 had been unauthorized. They

found that he intentionally gave false allegations relating to the circumstances of his presence at his clinic on 13 September 1997, and recommended that his services be terminated in the interest of the Agency. Based on the Applicant's record, they concluded that no improvement in his conduct, attitude or performance could be expected.

On 27 November 1997, the Director of UNRWA Operations, Jordan, informed the Applicant that, in view of his bad service record, it had been decided to terminate his employment in the interest of the Agency pursuant to the provisions of staff regulation 9.1 and staff rule 109.1.

On 30 November 1997, the Applicant requested that the Director of UNRWA Operations, Jordan, review the decision to terminate his service.

On 18 December 1997, the Director of UNRWA, Operations, Jordan, responded that, after reviewing the administrative decision, he found no reason to alter it.

On 5 January 1998, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 24 May 1998. Its evaluation, judgement and recommendation read as follows:

"EVALUATION AND JUDGEMENT

...

(a) The Board noted that the termination of the Appellant's appointment was properly made in accordance with Area Staff [Regulations and Rules].

(b) The Board also noted that the Appellant's behaviour through his years of service with the Agency was improper and [that he] was served with several disciplinary measures.

(c) In this context, the Board believes that the Administration has acted within the framework of standing [Regulations and Rules] without the interference of prejudice or any other extraneous factors.

IV. RECOMMENDATION

37. In view of the foregoing and without prejudice to any further oral or written submission to any party, the Board unanimously makes its recommendation to uphold the Administration's decision appealed against and that the case be dismissed."

On 21 June 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

I have carefully reviewed the report and noted its conclusions. The Board noted that the termination of your services was conducted in accordance with the relevant Area Staff Regulations and Rules. It also noted the negative performance appraisals which you have received and concluded that the Administration acted within the framework of standing Regulations and Rules, without the interference of prejudice or any other extraneous factors. The Board unanimously recommended that your appeal be dismissed.

I agree with the Board's recommendations and dismiss your appeal.

..."

On 20 and 24 February 1999, the Applicant requested that the Respondent further review his case.

On 1 March 1999, the Director of Administration and Human Resources informed the Applicant that the Respondent had made his decision and that the Applicant should submit an application to the Administrative Tribunal. The Applicant filed an appeal to the Tribunal, contesting the JAB determination supporting the Respondent's decision to terminate his employment. The JAB report had been rendered on 31 May 1998 and communicated to the Applicant on 21 June 1998; the Applicant's appeal was filed on 6 July 1999, thereby exceeding the statutory filing limit by more than one year. The Applicant's reason for the late filing was that he had suffered severe depression resulting from his discharge from employment.

Whereas the Applicant's principal contentions are:

1. The Applicant's failure to present a timely appeal to the Tribunal was a result of severe psychological distress and is therefore excusable.
2. The decision terminating the appointment of the Applicant lacked legal justification and was based on insufficient evidence.

3. The recommendation of the JAB to dismiss the Applicant's appeal was biased and a result of improper external pressure.

Whereas the Respondent's principal contentions are:

1. The application is not receivable by the Tribunal since it was not filed within the permissible time limits.

2. The Respondent's decision to terminate the appointment of the Applicant was in the interest of the Agency and was neither tainted by prejudice or improper motivation nor procedurally defective.

The Tribunal, having deliberated from 1 to 17 November 2000, now pronounces the following judgement:

I. The Respondent raises a preliminary objection regarding the receivability of the application, arguing that it was not timely. Staff rule 111.2 (f) provides that an appeal shall not be receivable unless the time limits have been met or have been waived "in exceptional circumstances". The Tribunal has consistently held that these circumstances are defined in the following manner: "only circumstances beyond the control of the appellant, which prevented the staff member from submitting a request for review and filing an appeal in time, may be deemed to constitute 'exceptional circumstances'" (Judgement No. 372, *Kayigamba* (1986), quoting JAB report No. 510, para. 33; see also Judgement No. 713, *Piquilloud* (1995)). As the preliminary issue involves consideration of the Applicant's honesty, reliability and integrity as a witness, it is necessary for the Tribunal to initially deal with some of the substantive issues raised by the Applicant, as these bear on that preliminary question.

II. The Applicant was informed on 27 November 1997 by the Director of UNRWA Operations, Jordan, that it had been decided to terminate his services "in the interest of the Agency" in view of his bad service record.

The letter of 27 November 1997 set out reasons for that decision. It referred to the Applicant's absence from duty on 13 September 1997 allegedly "on sick leave" which was found to have been unauthorized.

III. The principal evidence relied upon in support of the allegation against the Applicant was a prescription and sick note dated 13 September 1997 written on the Applicant's letterhead bearing what appeared to be his stamp and his signature and apparently written in his handwriting. The documents, if taken at face value, clearly indicated that he had been working and treating a patient in the private clinic on that date.

In the course of the investigation of the complaint in relation to the 13 September 1997 events, the Applicant was shown the documents in question. He denied writing them and initially denied that they bore his signature. He suggested that they may have been written by the "Relieving Physician" who he claimed was on duty in the private clinic on that date. He claimed that he did not see any patients in his private clinic on that date notwithstanding the report, the stamp and the signature. The Applicant suggested that the "Relieving Physician" normally signed his own name on documents but that occasionally he signed the Applicant's name on them. Furthermore, he had asked his colleague to use his own stamp. Finally he indicated that, if he in fact issued the note, it must have been issued on a date other than 13 September 1997 and that the date on the note was a mistake. The written record of the interview at which he made these explanations was duly signed by the Applicant.

IV. In his application, the Applicant argues for the first time that the events which allegedly had taken place on 13 September 1997 in fact occurred on 14 September 1997, a date when he was not on certified sick leave. Abandoning his earlier claim that he had not written the prescription or the sick note as had been previously suggested by him, he now claimed that on 14 September 1997 a patient came to his private clinic claiming to be a student at Yarmuk University in Irbid. He claimed that this person had asked him to give her a sick note for the 13th September 1997 when she had been absent from the University and stated that:

"In view of her state of health, and because she was very insistent, I gave her a prescription and a medical report on her health bearing the previous day's date. That was at her request, and in order to cover her absence from the University on that date. On 22 September 1997 I was shocked to receive a letter from [the Area Health Officer, Irbid] asking for comments on my alleged treatment of patients in my private clinic when I had been absent on sick leave on 13 September 1997. On 24 September 1997 I responded that I had treated no patients in my private clinic on the day in question (...). However, this response appeared inadequate to [the Area Health Officer, Irbid]. I was unaware that he had in his possession the original of the prescription and medical report I had made out for the female patient mentioned above. An official investigation was carried out by the Deputy Chief of the Field Health Programme and another official. I made it quite clear to them that I had seen no patients when I was on sick leave on the day in question, and that another eye specialist had been covering for me during that absence. If any medical report had been made out, it could well have been issued by the other specialist. If it was I who had issued the prescription and medical report, they must have been made out incorrectly on a different day. I knew nothing about the aforementioned female patient: they did not give me a copy of the medical report or tell me the patient's name while the investigation was being carried out. Two days after the investigation, having checked all the records in my private clinic on those who had been to see me during that week, it became clear to me that a report had been made out for the patient on 14 September 1997, in order to explain her absence from the University on 13 September 1997, and that it had been done at her request and because she had been very insistent."

The Applicant also explained that he believed that the incident of 13 September 1997 was "a set-up", a trap which had been conceived by the Area Health Officer, Irbid, with whom he had a personal disagreement. The Tribunal notes that instead of recognizing or acknowledging the error of his own ways - that he had deliberately issued a student with a falsified sick note and prescription bearing incorrect dates, or that he had treated a patient at his own private clinic when on sick leave from the Irbid Specialist Clinic - the Applicant sought to characterize what had occurred as "a trumped up farce".

V. The Tribunal has considered the Applicant's irreconcilable explanations relating to the events of 13 September 1997 and concludes that the Applicant's conduct can only be described as dishonest and reprehensible and that as a witness he is unworthy of credibility. Consequently, the Tribunal cannot accept the Applicant's argument that the time-bar should be waived.

VI. The Respondent's preliminary objection on the grounds of receivability arises from article 7, paragraph 4 of the Tribunal's Statute which provides that "an application shall not be receivable unless it is filed ... within ninety days reckoned from the date of the communication of the joint body's opinion containing recommendations unfavourable to the applicant." The decision of the Respondent based on the report of the JAB was communicated by the Respondent to the Applicant on 21 June 1998. The Applicant did not submit his application to the Tribunal until 6 July 1999, more than one year later. The Applicant requests the Tribunal to suspend the time limits in accordance with article 7, paragraph 5, of the Statute. In support of his request he states that "[i]t should be noted that my failure to submit the application within the specified time limits was due to my being in a very poor psychological state [as attested in a medical report dated 14 March 1999 from a Neuropsychiatrist in Irbid, a copy of which he provided] brought on by the termination of my services and requiring me to seek psychiatric treatment that I continue to receive to this day. Furthermore, I was not aware of the conditions attached to submission of an application to the Tribunal." The medical report referred to above states that on 20 December 1997 (which was six months before the Applicant learned of the Respondent's decision) the Applicant received treatment at a private clinic. According to the Neuropsychiatrist, the Applicant "appeared to ... be suffering from severe depression, together with headaches, difficulty in sleeping and general physical exhaustion. This condition was brought on by the termination of his services with UNRWA. [He was given] the appropriate medication, and [he remains] under medical supervision".

VII. The Respondent takes issue with the Applicant's request for suspension of the time limits and correctly points out that neither the Applicant nor the medical report have established or explained how or why the Applicant's depression prevented him from filing a timely application. He further points to letters dated 20 and 24 February 1999 written by the Applicant to the Respondent requesting a review of the decision made by the Respondent on 21 June 1998. The Respondent submits that these letters constitute strong evidence that the Applicant was quite able to submit his application in time. In the opinion of the Tribunal these letters belie the suggestion that the Applicant was suffering from any form of mental disability which would have precluded him from making a timely application to the Tribunal. In the opinion of the

Tribunal the letters are clear, lucid and concise. They indicate without doubt that the Applicant was fully aware of his right to appeal to the Tribunal.

VIII. The Tribunal is satisfied that the Applicant has not established the existence of exceptional circumstances which would justify suspending the time limits.

IX. In view of the foregoing, the Tribunal decides that the application is not receivable, being time-barred.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Kevin HAUGH
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary

SEPARATE OPINION OF MR. C.F. AMERASINGHE

I agree with the conclusion of the Tribunal that the application is irreceivable because it was filed out of time and there were no exceptional circumstances justifying the delay. However, I disagree partially with the basis on which that conclusion was reached.

I dissociate myself from the finding concerning the veracity and credibility of the Applicant (paragraphs III and IV of the judgement). That finding was based on evidence presented on the merits of the case. It was unnecessary for the Tribunal to consider any aspect of the merits in order to find the application irreceivable. There was sufficient cogent evidence in the pleadings of both parties on the preliminary objection raised by the Respondent to support the conclusion that the application was out of time and there were no exceptional circumstances to justify the delay. This evidence was that (i) the medical certificate provided by the Applicant did not clearly state that he was so affected by his mental state that he could not have seen to the filing of an application, (ii) the Applicant wrote two very coherent letters concerning his case to the Respondent not long after the Respondent's decision was communicated to him, and (iii) in any case one year's delay was unwarranted even if the Applicant's mental condition was such as he claims it was (which it was not) because even in these circumstances action could have been taken in much less than a year through a representative. Thus, the Tribunal should have concluded purely on this evidence that the Applicant had not discharged his burden of proof to show that there were exceptional circumstances justifying a delay, particularly more than one year, though a much shorter delay may have in the circumstances been justified.

In international litigation, e.g., before the International Court of Justice, when a preliminary objection relating to jurisdiction or admissibility is raised in the Respondent's answer, usually the preliminary objection is separated from the merits and no arguments are heard on the merits until the preliminary objection is disposed of. Sometimes the objection is joined to the merits because the Court feels that the objection is inextricably involved with the facts in the merits. (For example, in the *Barcelona Traction Co. Case (Preliminary Objections)*, 1964 ICJ Reports, p. 6 the Court did both. Two objections were decided without having the Respondent's memorial on the merits while

two were joined to the merits.) Some international administrative tribunals (IATs) have adopted this practice when the Respondent makes a request for separation. (See *Tarrab* (No. 9), ILOAT Judgement No. 499 (1982) and *Nielsen*, ILOAT Judgement No. 522 (1982) for the discussion of the practice of ILOAT). On the other hand, presumably in order to have cases disposed of expeditiously and with cost savings to the parties, respondents before IATs do not usually request the separation of preliminary objections and, even if they do, tribunals may not grant such requests. The practice of this Tribunal is against separation. Also separation is not requested generally by the Respondent.

However, the practice of non-separation of issues does not mean that the Tribunal should examine the merits of a case after arguments are presented on both the preliminary issues and the merits, unless it is essential for the disposition of the preliminary issues and the merits are inextricably linked to the preliminary issues. In this case, as already stated, I have concluded that the merits are not so inextricably linked to the preliminary objection and that the latter can be decided without an examination of the merits. Indeed, it may even be the case that there are questions to be asked about the evidence presented in the merits.

I should conclude by stating that as a matter of legal procedure the Tribunal should, in principle, scrupulously follow the practice of not examining the merits of a case where a preliminary objection to jurisdiction or irreceivability is raised. It is not in the interest of justice that the merits be examined in these circumstances. The real purpose of a preliminary objection of this nature is to avoid an examination or discussion of the merits.

(Signatures)

Chittharanjan Felix AMERASINGHE
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary



Administrative Tribunal

Distr.
LIMITED

AT/DEC/980
17 November 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 980

Case No. 1092: BALDWIN

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Victor
Yenyi Olungu;

Whereas, on 23 August 1999, Geoffrey L.G. Baldwin, a former staff member of the
United Nations, filed an application containing pleas which read as follows:

"II. PLEAS

- (a) (i) The Tribunal is requested to order the United Nations Joint Appeals Board [JAB] to let me know the numbers of the five most recent cases sent to a panel prior to mine, when they were received in the JAB office and when they were sent to a panel. The Tribunal is further requested to order the JAB to provide me a copy of the Secretary-General's original memo of 7 April 1997 and the Board's reply; and to provide me a copy of the minutes of the Panel's meeting in Executive Session on 23/3/99.
- (ii) The Tribunal is requested to order the Secretary-General to provide me a list of 200 Series advisers employed in the UN HQ, with their dates of birth, separated at age sixty and over with their dates of separation, within five years prior to my separation on 30/9/96 and after, or age sixty and over and still in service.

- (iii) The Tribunal is requested to declare this application uncontested should the Secretary-General fail to respond in due time, including any reasonably justified extensions, and to allow further pre-hearing pleas depending on the response of the Secretary-General.
- (b) (i) The Tribunal is requested to declare the response of the Representative of the Secretary-General to my appeal to the JAB totally out of order as not being in compliance with the time limits and provisions for their extension of the Staff Regulations and Rules, and of the Rules of Procedure of the JAB, and therefore to declare all my claims uncontested.
- (ii) The Tribunal is requested to declare the response of the Representative of the Secretary-General of 20 June 1997 out of order as (a) being an improper blanket denial which does not address the facts and (b) out of time limits; and therefore to declare the claims to which the Representative did not specifically respond as uncontested.
- (iii) The Tribunal is requested to rescind the decision of the Secretary-General not to renew my appointment as Interregional Adviser from 1 October 1996 and to order the payment of all emoluments that would have been due had the appointment been renewed from 1 October 1996 to the actual date of renewal, with interest thereon from 1 October 1996 until paid, including specifically the month of October 1996 which I worked full time without pay.
- (iv) The Tribunal is requested to order the Secretary-General to pay damages for the emotional stress of discrimination before and on separation and of unemployment after separation at least in the sum of \$100,000 plus \$20,000 for procedural delay.
- ...
- (d) Should the Secretary-General decide to pay compensation instead of renewing my appointment with effect from 1 October 1996, I claim net base salary plus post allowance for New York for three years and nine months, for the period 1 October 1996 to 30 June 2000, when I will reach age 65, plus the monetary awards of the Tribunal.
- (e) The Tribunal is requested to order the Secretary-General to pay such further punitive damages as it may consider appropriate."

Whereas the Respondent filed his answer on 21 January 2000;

Whereas, on 18 May 2000, the Respondent submitted additional documents;

Whereas the Applicant filed written observations on 30 May 2000;

Whereas, on 9 June 2000, the Applicant submitted supplementary observations on the Respondent's answer;

Whereas, on 12 June 2000, the Respondent filed an additional document;

Whereas the facts in the case are as follows:

The Applicant was initially appointed for a one-year period on 28 September 1987 as an Adviser in Water Resources Development, Natural Resources and Energy Division, Department of Technical Cooperation for Development in New York Headquarters, at the L-6 level under the 200 Series of the Staff Rules. His employment was subsequently extended through 30 September 1996, the date of his separation from service.

In a letter dated 28 June 1996, the Under-Secretary-General, Department for Development Support and Management Services (DDSMS), advised the Applicant that he had requested that the latter's contract be processed for an additional extension as Interregional Adviser for a period of three months, effective 1 July 1996. The letter also stated that "this will be your final extension; your contract will therefore not be renewed beyond 30 September 1996".

On 22 August 1996, in light of the expiration of the Applicant's contract on 30 September 1996, the Director, Division of Environment Management and Social Development, DDSMS, requested that the Applicant arrange for a smooth handover of his projects to other staff members, including files, status of projects, and all other relevant information to ensure against any delays. She also suggested a meeting with the other staff involved to review each project in detail.

On 23 September 1996, the Applicant responded to the Director's memorandum claiming that he had a heavy enough work load to justify a new contract well into 1997, and that the mandatory retirement rules did not apply in his case. The Applicant further stated that "[n]evertheless, I have attempted to follow your suggestion, with no success because it is unrealistic. All the water advisers are so overloaded that they cannot take on my work and they are having to consider which of their own to defer."

On 26 September 1996, the Managing Director of the Pakistan Water and Power Development Authority wrote to the Resident Representative, United Nations Development

Programme, Islamabad, requesting the retention of the Applicant for an additional six months until a project in which he was involved was completed. On the same day, the Officer-in-Charge, Natural Resources and Environment Planning and Management Branch, sent a memorandum to the Chief, Office of the Under-Secretary-General, DDSMS, advising her of the Managing Director of the Pakistan Water Development Authority's position regarding the Applicant's contract expiration, as well as expressing concern over the impact the non-renewal would have on work in progress.

On 1 October 1996, the Officer-in-Charge, DDSMS, granted the Applicant permission to remain in his office until the end of October 1996, but confirmed he would not be paid for the month.

On 29 November 1996, the Applicant requested an administrative review of the decision not to extend his appointment.

On 6 February 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 13 April 1999. Its considerations and recommendation read as follows:

"Considerations

16. The Panel found no basis for Appellant's claim that there was valid reason for him to expect that his appointment would be extended. His fixed-term appointment carried no expectancy of renewal. He had been informed in writing by the head of his department that his contract would not be renewed beyond 30 September 1996. The delay in the preparation of his Personnel Payroll Clearance Action (P-35) - in part, at least, caused by him - could not have, and did not have, any effect on the date of his separation.

17. The Panel found no evidence of discrimination or prejudice on the part of the Director, DESD[N]RM [Division for Economic and Social Development and Natural Resources Management].

...

Recommendation

25. The Panel recommends that Appellant be paid the sum of \$3,000.00 in return for a written statement that he abandons all present and future claims against the Organization.

26. The Panel makes no other recommendation with respect to [this] appeal."

On 9 August 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

" ...

The Secretary-General has examined your case in the light of the Board's report. In respect of Case 97-14, he has taken note of the Board's findings that there was no basis for your claim that you had valid reasons to expect the renewal of your appointment and that there was no evidence of discrimination or prejudice on the part of the Director, DESD[N]RM. ... The Secretary-General accepts the Board's findings in respect of [this case] and has decided to take no further action in respect of [this part] of your appeal.

...

The Secretary-General considers that the Board's recommendation to pay you \$3,000 is not based on any findings of liability on the part of the Organization. In the absence of any legal liability to pay you such an amount, considerations of equal treatment make such a settlement not in the interest of the Organization. The Secretary-General cannot, therefore, accept the Board's recommendation. ...

..."

On 23 August 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to renew the Applicant's appointment was improper and discriminatory and violated the United Nations policy against age discrimination.
2. The Applicant had an expectancy of renewal due to the length of his employment, his outstanding job performance and the fact that his work in progress extended beyond the expiration of his contract.
3. The appeal process before the JAB was biased and prejudicial and did not afford the Applicant a fair hearing.

Whereas the Respondent's principal contentions are:

1. The Applicant was employed on a series of fixed-term appointments under the 200 Series of the Staff Rules, which, by their very nature, were limited in scope and duration and expired on the date stated in the letter of appointment.
2. Above-average performance does not by itself create a legal expectancy of renewal of fixed-term appointments. The Respondent's decision not to renew the Applicant's appointment did not violate his rights.
3. Neither the 200 Series of the Staff Rules nor their application in the present case were discriminatory. The decision not to renew the Applicant's contract was not improperly motivated.
4. The Applicant did not sustain any material or moral injuries as a result of the Administration's actions, and is not entitled to compensation.

The Tribunal, having deliberated from 30 October to 17 November 2000, now pronounces the following judgement:

I. The Applicant appeals the decision of 9 August 1999, in which the Secretary-General accepted the JAB's recommendation against renewing the Applicant's fixed-term appointment. The Applicant claims that he had a legal expectancy of renewal of his fixed-term appointment; that its non-renewal was prejudicial; and, that he did not receive full and fair consideration.

II. As a fixed-term 200 Series employee, the Applicant's expectations were governed by staff rule 204.3 which provides:

"(a) Temporary appointments shall be for a fixed term and shall expire without notice on the date specified in the respective letters of appointment. They may be made for service in one or more mission areas and may be for short, intermediate or long term, as defined in [staff] rule 200.2 (f);

(b) Project personnel who are initially granted appointments for less than one year but whose appointments are subsequently extended so that the total continuous contractual service is one year or more but less than five years shall be considered to be in intermediate-term status with effect from the date from which their appointment is extended or converted to immediate-term status;

(c) Project personnel in intermediate-term status who complete five years' continuous service and whose appointments are extended for at least one further year shall be considered to be in long-term status with effect from the date on which they complete five years' continuous service;

(d) A temporary appointment does not carry any expectancy of renewal."

III. The Tribunal must determine whether there was an expectancy of renewal, implicit or explicit.

The JAB considered the Applicant's argument that he had a legal expectancy of renewal. It "found no basis for [the] Appellant's claim that there was valid reason for him to expect that his appointment would be extended. His fixed-term appointment carried no expectancy of renewal."

The Applicant presents several arguments in support of his claim to renewal. The first argument is based on performance. The Applicant claims that an above average performance should create a legal expectancy of renewal of fixed-term appointments. The Tribunal does not find merit in this claim. The Tribunal has held that employment with the Organization ceases on the expiration of a fixed-term appointment and that a legal expectancy of renewal would not be created by efficient or even outstanding performance. (Cf. Judgements No. 427, *Raj* (1988); No. 440, *Shankar* (1989) and No. 907, *Salvia* (1998)).

IV. The Applicant argues that he worked for the Organization for nine consecutive years, which implicitly created an expectation of renewal. As to the Applicant's length of service, the Respondent argues that the Tribunal has held that a series of successive fixed-term appointments in and of itself is not enough to create an exception to staff rule 104.12 (b), which stipulates that fixed-term appointments carry no right of renewal or conversion to any type of appointment (cf. Judgements No. 422, *Sawhney* (1988), No. 614, *Hunde* (1993) and No. 839, *Noyen* (1997)) and that this applies to staff rule 204.3 (d) as well.

The Applicant presents some persuasive arguments to the contrary. The record shows that the Applicant had worked nine consecutive years for the Organization, from 28 September 1987 until 1 October 1996. Although the Organization did not give him any explicit assurances that his assignments would lead to a contract renewal, the Applicant believed that he had such an expectancy. The Applicant argues that, based on his long history of renewals and the fact that his workload extended beyond the contract expiration date of his contract, the Organization had created an expectation of renewal.

The Respondent claims that the Applicant had no expectation of renewal as since he was employed on a series of fixed-term appointments under the 200 Series of the Staff Rules which, by their very nature, were limited in scope and duration and expired on the date stated in the letter of appointment.

The Tribunal does not accept the Respondent's position on this point. Although the Respondent may choose not to renew the Applicant's fixed-term appointment, under the 200 Series there is some precedent for discretionary departure when sufficient countervailing circumstances exist. (Cf. Judgements No. 885, *Handelsman* (1998) and No. 839, *Noyen* (1997)).

The Report of the Secretary-General on Human Resources Management to the General Assembly (A/C.5/51/34 of 22 November 1996) clearly sets forth the position of the Respondent:

"10. ... While reaffirming that the fixed-term appointment, by its terms, does not create an expectancy of renewal, the Tribunal examines all the surrounding circumstances to determine whether an expectancy of renewal was created in the particular case - for example through a verbal or written commitment, albeit informal, made to the staff member by the programme manager that the appointment would be renewed. In addition, staff members who have served on fixed-term appointments for an extended period (usually five years or more) are recognized by the Tribunal as having the right to receive every reasonable consideration for further employment. Even though this does not amount to a legal expectancy of continued employment, which would be contrary to the specific terms of the fixed-term appointment, a finding that the Organization failed to give every reasonable consideration for further employment will result in the award of damages which may be substantial. Finally, and even in those cases where the decision not to renew was purely discretionary, the Tribunal always gives careful attention to the issue of whether the decision was affected by lack of due process, mistake of fact, prejudice or other extraneous motives. In such cases, the Tribunal would normally award damages to the staff member whose appointment was allowed to expire, on the ground that it is an implied condition of

employment that all decisions, including a decision not to renew an appointment, are taken fairly and in the interests of the Organization.”

V. In conclusion, the Tribunal finds that the failure by the Administration to renew the Applicant's contract was not tainted by discrimination. However, based on the circumstances of the case, the Applicant did have a reasonable expectancy to be considered for renewal.

VI. Accordingly, the Tribunal awards the Applicant six months net base salary which includes salary for the month of October 1996 for which the Applicant was not compensated.

VII. In view of the foregoing, the Tribunal:

(a) Orders the Respondent to pay the Applicant six months net base salary at the rate in effect at the time of his separation from service.

(b) Rejects all other pleas.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Victor YENYI OLUNGU
Member

New York, 17 November 2000

Maritza STRUYVENBERG
Executive Secretary



Administrative Tribunal

Distr.
LIMITED

AT/DEC/981
21 November 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 981

Case No. 1075: MASRI

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, Vice-President, presiding; Mr. Chittharanjan Felix
Amerasinghe; Mr. Kevin Haugh;

Whereas, on 15 March 1999, Rami Antoine Masri, a former staff member of the
United Nations, filed an application containing pleas which read as follows:

"SECTION II. PLEAS

Applicant prays the Tribunal to ...:

1. [Rescind] the contested decision of termination of services.
2. [Reinstate the] Applicant to duty.
3. [Consider] the period of absence special leave with full pay.
4. [Pay] compensation for the injury sustained, including compensation for the premeditated delay in process.
5. [Pay] counseling fees and secretarial expenses, estimated at US\$ 500."

Whereas the Respondent filed his answer on 15 December 1999;

Whereas the Applicant filed written observations on 28 January 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Disengagement Observer Force (UNDOF) on 14 December 1992, as a Clerk/Typist at the G-3 level, on a one-month and eighteen-day short-term appointment. On 1 February 1993, his appointment was converted to a three-month fixed-term appointment under the 100 Series of the Staff Rules. His fixed-term appointment was extended several times until 30 November 1996, when he was separated from service.

On 22 November 1996, the Chief, Personnel Management and Support Service, Division of Peacekeeping Operations (DPKO), faxed a memorandum to the Chief Administrative Officer, UNDOF, indicating that "[the Applicant] should be separated when his fixed-term appointment expires on 30 November 1996". On 25 November 1996, the Chief, Civilian Personnel, UNDOF, in a memorandum to the Applicant advised him of the decision of the Office of Human Resources Management (OHRM) that he would be separated from UNDOF on 30 November 1996. The memorandum referred to an earlier meeting held on 20 November 1996 with the Applicant when he was allegedly advised that his contract would not be renewed because his brother was also employed by UNDOF.

On 17 December 1996, the Applicant wrote to the Secretary-General appealing the decision not to renew his contract, alleging that he was improperly and arbitrarily terminated due to his failure to reveal that his brother was a staff member when he filled out his employment application. At the time, the Chief Administrative Officer and the Personnel Officer who interviewed him were both aware that his brother worked for another division of UNDOF and it was his brother who arranged for the interview. The Applicant cited staff rule 104.10 in support of his position, which he claimed permits employment of a relative when another equally well qualified candidate cannot be recruited. He also claimed that since his post remained vacant, the Rule did not bar renewal of his contract.

On 7 March 1997, the Applicant not having received a response, lodged an appeal with the Joint Appeals Board (JAB) alleging that the Administration knew of his brother's employment at the time he was hired, and requesting a reversal of the decision not to renew his contract.

On 6 July 1998, the Applicant requested the Secretary of the JAB to proceed with his appeal on the merits, since the Respondent had failed to file a reply for over a year. On 22 September 1998, the JAB submitted its report, observing that in the absence of the Respondent's reply, it was constrained to render an "independent determination based on the information already before it - the Applicant's status file and his statement on appeal."

Its considerations and recommendations read as follows:

"Considerations ...:

...

18. The Panel noted the Appellant's argument that his superiors were aware of his brother's employment with the UN, even before he was recruited. It also observed that when the Appellant filled out the Personal History form, he failed to answer the question as to whether he had any relative employed with the UN. In this regard, the Panel noted that the Appellant's superiors at UNDOF did not request that he properly fill out the application form, which may have been tantamount to contributory negligence.

19. It was the Panel's opinion that the Administration had at least constructive knowledge of the brother's employment with the UN, as evidenced by its failure to ascertain the Appellant's eligibility for employment.

20. The Panel noted that the Appellant served at UNDOF for four years on several fixed-term appointments, without the Administration taking any action to redress his situation. This, in the opinion of the Panel, constituted a serious administrative error, which created a reasonable belief on the Appellant that, pursuant to the exception contained in staff rule 104.10 (a), he was eligible for employment with the UN, his brother's employment notwithstanding.

21. The Panel further noted that the Appellant relied to his own detriment, on the Administration's knowledge (or constructive knowledge) of his brother's employment with the UN, and that such detrimental reliance was reasonable under the circumstances.

22. It was the Panel's view that the Administration did not follow proper procedure in the recruitment of the Appellant, and in the retention of his services for four years. This administrative error created a reasonable expectancy of continued employment on the Appellant. The Panel was of the view that the Administration should be estopped from invoking the provisions of staff rule 104.10 (a) to decide the non-renewal of the Appellant FTA [fixed-term appointment]. To the contrary, the Panel felt that the Administration could

use the exception contained in this rule to allow the continuous employment of the Appellant. (The provisions of staff rule 104.10 (a) stipulate that the Organization may recruit a person whose brother, sister, son, daughter, father or mother is a U.N. staff member if another well-qualified candidate cannot be recruited.)

Recommendations

22. In light of the foregoing facts, the Panel *unanimously recommends* that:

- (a) The Appellant be reinstated to his post, ... [o]r in the alternative,
- (b) The Appellant be paid 14 months net base salary and attendant benefits, representing the period from the date of the filing of the appeal to the date of the consideration of it by the JAB Panel."

On 5 October 1998, the JAB forwarded its report to the Under-Secretary-General for Management advising him that the Respondent's reply was received ten days after the Panel completed its consideration of the case and was not considered by the Panel in making its decision.

By memorandum dated 9 October 1998, the Under-Secretary-General for Management informed the Secretary of the JAB as follows:

"...

2. I have decided to remand the appeal of [the Applicant] to the Joint Appeals Board for consideration, as it is not in the interest of the Secretary-General, or of an appellant, to have cases considered on the basis of one-sided accounts. Before I can consider, on behalf of the Secretary-General, a recommendation, especially a recommendation for the award of monetary compensation, I must be confident that the recommending body has gathered all the facts necessary for a full consideration of the issues raised by both parties, and not just one, and that its report reflects this full consideration."

The JAB submitted its second report on 2 December 1998. Its conclusions and recommendations read as follows:

"Conclusions and Recommendations:

22. The Panel, after reexamining the whole case in the light of the Respondent's reply, unanimously adopted the conclusions and recommendations contained in its previous report

dated 22 September 1998. (...)."

On 15 March 1999, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

The Secretary-General does not agree with the Board's conclusions. He first considers that the onus of providing complete and accurate information when filling out the Personal History form is on you and the Administration's reportedly 'constructive knowledge of [your] brother's employment with the UN' does not detract from your responsibility to provide such information. The Secretary-General further considers that the strict application of staff rule 104.10 (a) on family relationships would have precluded your employment with UNDOF. The fact that you were granted a fixed-term appointment where you would ordinarily not have been employed does not create an expectancy of, or a right to, continued employment, or of compensation in lieu thereof.

In light of the foregoing, the Secretary-General cannot accept the Board's recommendation that you be reinstated to service with UNDOF or that you be paid 14 months net base salary and attendant benefits. The Secretary-General has decided to take no further action on your appeal.

..."

On 15 March 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to renew the Applicant's contract on the grounds that he failed to reveal that his brother was a UN staff member at the time of his hiring was improper and unwarranted.
2. The facts substantiate the Applicant's claim that the Respondent was aware of his brother's employment status when the Applicant was hired which fact constitute a waiver of any alleged violation of Staff Rules by the Applicant.
3. The Applicant's length of service created an expectation of continued employment.

4. The Respondent's lengthy delay in responding to the Applicant's appeal before the JAB was unreasonable and violated the Applicant's due process rights.

Whereas the Respondent's principal contentions are:

1. The Applicant was on a fixed-term appointment which expires on the date stated in the letter of appointment. The fixed-term appointment does not carry any expectancy of renewal. The decision of the Administration not to renew the Applicant's contract did not violate his rights.

2. Events regarding the Applicant's failure to declare a family relationship did not undermine the discretionary authority of the Secretary-General not to renew the Applicant's fixed term appointment.

3. The Applicant did not sustain any material or moral injuries as a result of the Administration's actions, and is not entitled to compensation. The Applicant's request for the award of costs is without merit.

The Tribunal, having deliberated from 30 October to 21 November 2000, now pronounces the following judgement:

I. The Applicant claims that the Respondent's decision not to renew his fixed-term contract due to the fact that he did not reveal in his Personal History form that his brother was a UNDOF staff member at the time should be rescinded and that he should be either reinstated or compensated accordingly.

II. Regarding his omission, the Applicant alleges that the Administration had "constructive knowledge" of his brother's employment and, consequently, staff rule 104.10 (a), does not apply. The rule provides as follows: "Except where another person equally well qualified cannot be recruited appointment shall not be granted to a person who bears any of the following relationships to a staff member: father, mother, son, daughter, brother or sister."

III. The Respondent, on his part, does not deny such "constructive knowledge" but maintains that, "it would not affect the Applicant's obligation to correctly complete his Personal History form".

The Respondent informed the Applicant that "the onus of providing complete and accurate information when filling out the Personal History form is on you and the Administration's reportedly 'constructive knowledge of [your] brother's employment with the UN' does not detract from your responsibility to provide such information."

IV. The Tribunal is of the view that the Applicant's omission when filling out the Personal History form must be considered in conjunction with the acceptance by the Administration of the application. The implication is that the information received was satisfactory to the Administration and that it, by its acceptance, waived the necessity of including that information.

V. The Applicant, then, may have been justified in his belief that such information as he omitted was not relevant to his being appointed as a staff member. He did not mislead the Organization as he did not deny having a brother who was staff member.

VI. The United Nations cannot act but through the intermediary of its agents. The conduct of such agents is imputed to the Organization, and the Organization must remain bound by their actions. The Administration that accepted the original application is the same Administration that wants to find fault with this application, ratified through several renewals of the Appellant's appointment, four years later. That is a contradiction.

VII. Staff rule 104.12 (b) (ii), invoked by the Respondent provides that fixed-term appointments do not carry any expectancy of renewal or of conversion to any other type of appointment. The discretion of the Secretary-General to renew or not to renew a fixed-term contract is wide, but it has, however, its limits. Administrative decisions affecting a staff member must not run counter to certain concepts fundamental to the Organization. They must not be improperly motivated, they must not violate due process, they must not be arbitrary, taken in bad faith or be discriminatory.

VIII. The Tribunal finds that the Administration has not proceeded in good faith. It has treated the Applicant badly. Suddenly denying him his legitimacy as a staff member, after having considered him as an employee and periodically renewing his employment for four years, is indeed bad faith. The improper motivation and the arbitrariness of the Administration are evident from the reasons given to the Applicant for not renewing his contract.

IX. In Judgement No. 440, *Shankar*, the Tribunal found that the Applicant, a staff member on a fixed-term contract had no legal expectancy of continued employment. It added that "[a]fter reviewing the circumstances of the case, the Tribunal agrees with the Joint Appeals Board's finding that the non-renewal of the Applicant's fixed-term appointment was vitiated by lack of due process, lack of good faith and procedural irregularities" and ruled for the Applicant. The Tribunal, in the present case, reaches a similar conclusion: the Administration's motives were improper.

X. Another aspect of this case, that merits special consideration is the year-long delay by the Respondent in replying to the Applicant's appeal to the JAB. The excuse offered by the Administration each time it asked for an extension of the time-limit, was that the "office is actively engaged in obtaining all the information necessary to complete the statement on behalf of the Secretary-General". The Tribunal notes that, finally, the JAB decided to consider the case without the Respondent's reply and recommended in favour of the Applicant. It also notes that the Under-Secretary-General for Management remanded the appeal to the JAB for re-examination, because he felt that "it [was] not in the interest of the Secretary-General, or of an [a]ppellant, to have cases considered on the basis of one-sided accounts", adding that before considering a recommendation, "especially a recommendation for the award of monetary compensation, [he] must be confident that the recommending body ha[d] gathered all the facts necessary for a full consideration of the issues raised by both parties, and not just one, and that its report reflect[ed] this full consideration". However, the Tribunal finds that this explanation does not excuse the conduct of the Administration for its inordinate delay in answering the appeal, but that indeed ironically the entire situation was the sole creation of the Administration.

XI. In light of the foregoing, the Tribunal:

- (a) Orders the Respondent to pay the Applicant 18 months net base salary at the rate in effect at the time he was separated from service as compensation;
- (b) Rejects all other pleas.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Kevin HAUGH
Member

New York, 21 November 2000

Maritza STRUYVENBERG
Executive Secretary



Administrative Tribunal

Distr.
LIMITED

AT/DEC/982
21 November 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 982

Case No. 1066: HERNANDEZ-CORREA

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS.

Composed of Mr. Mayer Gabay, First Vice-President, presiding; Mr. Julio Barboza, Second Vice-President; Mr. Victor Yenyi Olungu;

Whereas at the request of Diana Hernandez-Correa, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 November 1998 and 28 February 1999 the time limit for the filing of an application with the Tribunal;

Whereas, on 18 February 1999, the Applicant filed an application containing pleas which read, in part, as follows:

"II. Pleas

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

- (c) *To decide* to hold oral proceedings on the present application in accordance with article 8 of its Statute and chapter IV of its Rules; and

- (d) *To order* the Respondent to produce the relevant minutes of the Appointment and Placement Committee's deliberations concerning the posts to which the Applicant applied or for which she had been found eligible.

8. On the merits ...

- (a) *To rescind* the decision of the Secretary-General based on the recommendation of the Joint Appeals Board to make no award nor take any action in the Applicant's case;
- (b) *To find and rule* that the decision of the Respondent to abolish the Applicant's post, not to place the Applicant in her former job or in another post in spite of numerous vacancies and to separate her from service was motivated by prejudice and procedurally flawed;
- (c) *To find and rule* that the Joint Appeals Board erred as a matter of law and fact in finding that the Respondent's decision to separate the Applicant from service was not proven to be improper;
- (d) *To find and rule* that the Applicant's career with UNICEF has been adversely affected by the intrusion of discriminatory and prejudicial treatment and that her reputation and financial well being have consequently been damaged;
- (e) *To order* that the Applicant be reinstated at the earliest opportunity with retroactive effect from 31 July 1996;
- (f) *To award* the Applicant appropriate compensation in the amount of three years' net base pay for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;
- (g) *To fix* pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;
- (h) *To award* the Applicant as costs, the sum of \$7,500.00 in legal fees and \$500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 7 October 1999;

Whereas the Applicant filed written observations on 18 May 2000;

Whereas, on 13 July 2000, the Tribunal decided that no oral proceedings would be held in the case;

Whereas, on 17 July 2000, the Tribunal requested the Respondent to provide it with a certain document;

Whereas, on 21 July 2000, the Respondent submitted the document requested by the Tribunal;

Whereas, on 7 August 2000, the Tribunal put questions to the Respondent;

Whereas, on 8 August 2000, the Tribunal informed the parties that it had decided to adjourn consideration of the case until its next session;

Whereas, on 23 August 2000, the Respondent provided answers to the questions put by the Tribunal on 7 August 2000;

Whereas, on 11 October 2000, the Applicant commented on the answers submitted by the Respondent on 23 July 2000;

Whereas, on 1 November 2000, the Respondent submitted additional documents;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 24 August 1987, on a short-term contract at the G-3 level, as a Recruitment Clerk. On 31 October 1987, her functional title was changed to Secretary and her short-term appointment extended. On 24 February 1988, her short-term appointment was converted to a fixed-term appointment and again extended. On 1 June 1989, the Applicant was promoted to the G-4 level. Her appointment was extended several times, until 31 July 1996, when she was separated from service.

On 10 November 1995, the Applicant was informed by the Director, Programme Division, that her contract would be extended through 31 July 1996. On 26 January 1996, the Director, Programme Division, informed the Applicant that the Budget Planning and Review Committee had recommended that her G-4 post be abolished, that he expected the Executive Board to accept this recommendation, and that her contract would not be renewed beyond 31 July 1996. He also informed

her that her name would be placed on a roster for review against suitable available posts, encouraged her to apply for vacant posts, and advised her that if she was not successful, she would be separated in accordance with the applicable rules and regulations.

Between January and July 1996, the Applicant was considered for 13 posts identified by UNICEF and for four higher level posts for which she had applied herself. She was not selected for any of these posts.

On 13 May 1996, the review by the Selection Advisory Panel noted that one post (Information Assistant, G-6 level) required a writing and language skill test. The Applicant took the test and was rated as average by the Supervisor of the post, who reported that the Applicant "was not ready to take up the additional functions required in this G-6 post, at this time".

On 14 June 1996, all UNICEF staff at Headquarters were notified that all General Service staff separated from service upon abolition of their posts would be allowed to apply for future vacant posts as internal applicants for a maximum period of one year from the date of separation.

On 17 July 1996, the Applicant submitted a request for review of the decision "aimed at terminating [her] service ... with effect from 31 July 1996". On 19 July 1996, she requested the Joint Appeals Board (JAB) to suspend action (i) as to her separation from service, and (ii) as to her non-selection for the G-6 post. On 30 July 1996, the JAB recommended that "nothing be done by the Secretary-General to complete the termination process until after the substance of the case has been dealt with". On 31 July 1996, the Under-Secretary-General for Management conveyed to the Applicant the decision of the Secretary-General not to accept the JAB's recommendation.

On 16 August 1996, the Applicant lodged an appeal on the merits with the JAB. The JAB submitted its report on 14 April 1998. Its considerations and recommendation read as follows:

"Considerations

...

14. It found that [the] Appellant's contentions that she had been 'targeted', in part, for staff union activities, and that UNICEF had employed subterfuge to terminate her appointment were charges of prejudice or improper motivation. The Panel was aware that the Administrative Tribunal has consistently held, since its Judgement No. 93 (*Cooperman*)

that the burden of proving prejudice or improper motivation rests with the Appellant. The Panel could find no evidence provided by [the] Appellant to prove these allegations.

15. Similarly, the Panel found no substantiation to the charge that the manner in which [the] Appellant had been tested for the G-6 level post was discriminatory.

16. The Panel decided that the two issues it needed to resolve were (a) whether or not [the] Appellant had a legitimate claim to the upgraded G-6 post, and (b) whether she had received full and fair consideration for other vacancies. ...

17. As for the second issue, the Panel felt that the relevant bases for its review were the text of staff regulation 4.4 and UNAT [United Nations Administrative Tribunal] Judgements No. 362 (*Williamson*) and No. 679 (*Fagan*). While the meaning and intent of these are quite clear, the Panel noted that they are not as categorical with respect to the issues of seniority and of precedence of fixed-term over short-term, as the text of staff rule 109.1 (c) (i) on the precedence of permanent and probationary appointees, and even that rule allows for judgement based on relative competence. The members of the Panel recalled that in placing any person on a post that some weight must be given to the judgement of the supervisor responsible for the work of the unit. Before proceeding further, it decided it needed information on the actual filling of the vacant G-4 post by UNICEF.

...

19. Having reviewed the classification documents for [the] Appellant's G-4 post and the post classified at the G-6 level, the Panel was satisfied that the latter [G-6 level post] was a new and different post. It could find no evidence that there was a procedural defect in the creation and classification of the post. Similarly, recalling that it was not called upon to substitute its judgement for that of the Appointment and Placement Committee, the Panel could find no evidence of a procedural defect in the choice of another staff member for the post.

20. Finally, the Panel concluded that there was no evidence that [the] Appellant had not received full and fair consideration for the various G-4 posts for which [the] Appellant was qualified. It was reinforced in this judgement by a review of the staff members actually chosen, all of whom were serious and/or endangered candidates. In sum, the Panel came to the conclusion that [the] Appellant's separation was a result of arithmetic, i.e. if there are 'n' available posts and 'x' qualified candidates and 'x' is larger than 'n', then it will not be possible to place (x-n) staff members.

Recommendation

21. The Panel makes no recommendation with respect to this appeal."

On 27 April 1998, the Under-Secretary-General for Management transmitted a copy of the JAB report to the Applicant and informed her that the Secretary-General had taken note that the Panel made no recommendation with respect to her appeal, and accordingly, had decided to take no further action in her case.

On 18 February 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to abolish the Applicant's post violated the letter and spirit of the UN Staff Regulations and Rules.
2. The Respondent failed to meet its obligation to demonstrate that the Applicant could not have filled any of the vacant posts at her level which were used to place temporary staff or those with less seniority and therefore the Respondent failed to apply in good faith the established policies for placement of staff in abolished posts with respect to the Applicant. The abolition of the Applicant's post was a subterfuge for her subsequent non-renewal and in effect constituted an unjustified termination of her employment.
3. The procedure used in considering the Applicant's candidacy for her own post as well as for other suitable posts was arbitrary and unfair and failed to comply with the standard of good faith required by the Tribunal.
4. The Applicant had a reasonable expectancy of renewal of her appointment based upon an examination of all the circumstances of her case.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy of renewal of her fixed-term appointment.
2. The decision to abolish the Applicant's post was properly taken and took account of the rights of staff serving on fixed-term appointments whose posts have been abolished.
3. The Respondent's actions were not discriminatory, nor were they vitiated by prejudice or any other extraneous factors.
4. The Applicant's request for the award of costs is without merit.

The Tribunal, having deliberated from 13 to 27 July 2000 in Geneva and from 8 to 21 November 2000 in New York, now pronounces the following judgement:

I. The first question to be examined by the Tribunal refers to the failure of the Administration to consider her for a permanent post after five years of service on fixed-term contracts, in accordance with General Assembly resolution 37/126, which provides that "staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment".

II. The Respondent alleges that the Applicant raised the issue for the first time in her application to the JAB in 1996, three years after having completed five years of continued service, and that consequently her plea was time barred. Moreover, the Respondent maintains that a staff member serving on a fixed-term appointment is not entitled to consideration for a career appointment when the functions of his or her post are not viewed by the Administration to be "of a continuing nature to a degree warranting a career appointment under General Assembly resolution 37/126".

III. In Judgement No. 632, *Mughir* (1993) the Tribunal held that "the precarious financial situation of *Development Forum* made it impossible for the Administration to view the Applicant's functions as being of a continuing nature to a degree warranting a career appointment under General Assembly resolution 37/126." In the present case, the Administration abolished the post of the Applicant and thus obviously did not consider its functions of a continuing nature. This argument also refutes the Applicant's allegation that UNICEF had converted support budget posts, like the one encumbered by the Applicant, into established posts. The Applicant bases her allegation on a memorandum of 12 February 1999, and a circular letter dated 15 March 1999 on the same subject addressed to all staff members, i.e. about three years after her separation. A careful reading of these documents - only one example of the ambiguous evidence presented by the Applicant - indicates that only 6 per cent of such posts were converted to "established". Clearly the post encumbered by the Applicant was not included in the 6 per cent, as it was abolished. Furthermore, the Applicant was

never placed against a core post during the entire period of her employment with UNICEF, including the three years during which she claims she should have been considered for a career appointment.

IV. The Tribunal turns now to the two main issues in the case. The first is whether the abolition of the Applicant's G-4 post and the creation of a new G-6 post, which combined some of the functions of the former as well as additional functions, in fact created a new and different post demanding different skills. The second issue is whether the Administration made reasonable efforts to place the Applicant in a post equivalent to the one she occupied. The affirmative answer to the first question would imply that the Applicant was wronged by the Administration, because the motivation for abolishing one post and creating another would have been improper, and the abolition an excuse to terminate the Applicant's employment. If the answer to the second question is in the negative, the Administration would not have respected the priority consideration due to her, as she indeed claims.

V. As to the first question, the Applicant claims that the functions of the new post were similar to those of the G-4 post. She also claims that she had already been performing these and most of the supposedly higher level functions of the new post new functions for several years and it was precisely because of that fact that she had been asking for the reclassification of the G-4 post.

However, in the view of the Tribunal, the Applicant did not manage to prove her point. In the first place, the establishment of the new post two levels higher indicates that the Administration was seeking a higher degree of performance requiring a greater degree of initiative, superior decision-making capacity and additional language skills. The Applicant's claim as to having been already performing most of the functions of the G-6 post is not supported by the evidence. At any rate, the excerpts of the minutes of the APC meeting held on 11 June 1996, reviewing candidates for the G-6 post indicate that the Applicant was considered average in English and weak in Spanish written expression. The Applicant's supervisor agreed with this assessment. She recognized the Applicant's "good performance in her current post", however, she felt, "that while she ha[d] potential for advancement to a G-5 level post she was not ready to take up the additional functions required in this G-6 post, at this time."

VI. The Tribunal's function is not to substitute its judgement for that of the APC. Rather, the Tribunal's function is to determine whether there was a violation of due process, or whether the decision of the APC was arbitrary, tainted by prejudice, procedurally defective or suffering from some other important defect. The *onus probandi* is, naturally, on the Applicant, who has made some unsubstantiated charges including prejudice against women, and resentment against her due to her position as a union representative. However, she has not managed to produce supporting evidence. The Tribunal must therefore reject this claim.

VII. As to the second question, i.e. whether the Respondent made reasonable efforts to place the Applicant in a new post, the Tribunal is satisfied that the Administration considered the Applicant for thirteen positions - a considerable number. The Applicant herself applied for four other posts - a total of seventeen.

The Tribunal notes that the Applicant did not have high priority. Permanent staff members in abolished posts were to be considered first, then staff members on fixed-term contracts in abolished posts. Moreover, many candidates for the posts for which the Applicant could be considered were staff members with priority, equal to or higher than the Applicant's. Therefore, the arithmetic reasoning of the JAB (a number of qualified candidates larger than the number of available posts will exclude some candidates) turns out to be quite correct. Finally - and this is a decisive consideration - priorities are relative, so that some candidates with lesser priority may be selected if the selection panel is convinced that he or she has better qualifications.

Unless the selection process is vitiated by arbitrariness, a lack of due process, or improper motivation, the Tribunal will not interfere with the selection process. In the present case, the Tribunal finds no reason to do so.

VIII. For all of the foregoing reasons, the application is rejected in its entirety.

(Signatures)

Mayer GABAY
First Vice-President, presiding

Julio BARBOZA
Second Vice-President

Victor YENYI OLUNGU
Member

New York 21 November 2000

Maritza STRUYVENBERG
Executive Secretary



Administrative Tribunal

Distr.
LIMITED

AT/DEC/983
21 November 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 983

Case No. 1072: IDRIS

Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestine Refugees
in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza, Vice-President; Mr. Kevin Haugh;

Whereas at the request of Husni Ahmed Idriss, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), the President of the Tribunal, with the agreement of the Respondent, extended until 31 May 1999 the time-limit for the filing of an application with the Tribunal;

Whereas, on 15 February 1999, the Applicant filed an application containing pleas which read as follows:

"SECTION II. PLEAS

Applicant prays the esteemed Tribunal to ...:

- a. [Rescind the] contested decision and [reinstate the] Applicant to duty.
- b. [Consider the] period of cessation as special leave with full pay.

- c. [Compensate] the Applicant for the damage and injury sustained.
- d. [Pay] counseling and secretarial and transport expenses estimated at US\$ 800."

Whereas the Respondent filed his answer on 30 November 1999;

Whereas, on 6 July 2000, the Applicant filed an additional document;

Whereas, on 7 July 2000, the Tribunal put questions to the Respondent;

Whereas, on 20 July 2000, the Respondent produced certain confidential documents requested by the Tribunal and asked that they not be transmitted to the Applicant in order to protect the identity of the witnesses;

Whereas, on 7 August 2000, the Tribunal put questions to the Applicant and to the Respondent;

Whereas, on 8 August 2000, the Tribunal informed the parties that it had decided to adjourn consideration of the case until its next session;

Whereas, on 7 September 2000, the Respondent provided answers to the questions put by the Tribunal on 7 August 2000;

Whereas, on 15 October 2000, the Respondent provided answers to the questions put by the Tribunal on 7 August 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 1 January 1985, as an Area staff member, with the title of Welfare Worker, grade 7, Tyre Office, South Lebanon, on a temporary indefinite appointment. On 1 July 1993, his post was reclassified to Social Worker, grade 9. Since his qualifications and experience did not fully meet the requirements of the reclassified post, he was promoted to grade 8. The Applicant was separated from service, effective 13 May 1997.

On 5 February 1996, the Director, UNRWA Affairs, convened a Board of Inquiry (BOI) on 24 October 1995, to investigate alleged irregularities in connection with the distribution of commodities at Jal El Bahr, Tyre Area.

On 11 November 1996, the BOI submitted a report to the Director, UNRWA Affairs. The report included a number of allegations made against the Applicant. The BOI found, among other things that the Applicant had misappropriated Agency funds and intentionally deviated from its

Regulations and Rules. The BOI reconvened, at the request of the Director, UNRWA Affairs, on 17 and 18 March 1997, to "confront accused staff members with the accusations" and to give them an opportunity to respond to the allegations. It submitted a supplementary report on 15 April 1997. In the Applicant's case, nothing new came to light and the conclusions of the original report stood.

In a memorandum dated 7 May 1997, the Director, UNRWA Affairs, informed the Applicant that based on the findings of the BOI, he had decided to terminate the services of the Applicant for misconduct pursuant to Area staff regulation 10.2, effective close of business, 13 May 1997. He enclosed extracts of the BOI reports.

On 6 June 1997, the Applicant requested the Director, UNWRA Affairs, to review his decision. On 12 June 1997, the Director, UNRWA Affairs, informed the Applicant that his decision would not be changed.

On 11 July 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 30 June 1998. Its evaluation, judgement and recommendation read, in part, as follows:

"III. EVALUATION AND JUDGEMENT

14. ...

(a) The Board noted that the termination of the Appellant's appointment was properly made in accordance with Area Staff [Regulations and Rules].

(b) In this context, the Board believes that the Administration has acted within the framework of standing [Regulations and Rules] without the interference of prejudice or any other extraneous factors.

IV. RECOMMENDATION

15. In view of the foregoing and without prejudice to any further oral or written submission to any party, the Board unanimously makes its recommendation to uphold the Administration's decision appealed against and that the case be dismissed."

On 6 August 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

“ ...

I have carefully reviewed the Board's report and noted its conclusions. The Board noted that the termination of your appointment was properly made in accordance with the Area Staff [Regulations and Rules], and opined that this action was taken without the interference of prejudice or any other extraneous factors. Accordingly, the Board unanimously recommended to uphold the decision to terminate your appointment.

I accept the Board's recommendation. Your appeal is dismissed.”

On 15 February 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The BOI investigation was incomplete and prejudicial and violated the due process rights of the Applicant. The Applicant was not permitted the opportunity to confront and examine a number of key witnesses.
2. The JAB was provided only with extracts of the BOI reports and therefore did not give the case a proper hearing and exercise its duties and obligations in that regard.
3. The Respondent's decision to terminate the Applicant's services for misconduct was not based on proper evidence.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's services for misconduct fell within the discretionary powers of the Commissioner-General.
2. The Respondent's decision to terminate the Applicant's services for misconduct was correct, not motivated by any improper motive and supported by evidence.

The Tribunal, having deliberated from 7 July to 2 August 2000 in Geneva and from 31 October to 21 November 2000 in New York, now pronounces the following judgement:

I. Following reports of irregularities involving certain staff members during the distribution of commodities at Jal el Bahr in the Tyre Area in October 1995, the Director of UNRWA Affairs, Lebanon, convened a BOI to investigate any irregularities and possible non-compliance with Agency Rules, Regulations and Norms.

II. On 11 November 1996, the BOI submitted to the Director of UNRWA Affairs what might be described as an Interim Report. It had by then met more than thirty times and interviewed twenty-five persons. The Report contained summaries of testimony from a number of witnesses relating to the Applicant. The identities of some of those witnesses were kept from the Applicant, either because it was felt that to divulge their names might endanger them or because it was clear that the identity of the accusers would have been known to the Applicant. The Interim Report also contained a record of the BOI's interview with the Applicant. The Tribunal is satisfied from that record that the Applicant understood the allegations against him and was afforded a reasonable opportunity of refuting the charges levelled against him.

III. The BOI observed that during its interview with the Applicant he was totally uncooperative, that he displayed selective amnesia (i.e. claiming failed memory in relation to matters where he could not provide a satisfactory answer) and that he obstructed the proceedings of the BOI. It concluded that the Applicant had misappropriated Agency funds, had intentionally violated the Regulations and Rules and had abused his authority as Social Worker and the authority delegated to him by his immediate superior. It stated:

"... In [one] way or another he [has] always abused UNRWA's system and misappropriated its resources in order to make a personal wealth and/or prestige at the expense of the services/allotments and rights of the refugees. [The Applicant] has committed many wrongdoings, which unfortunately [were] covered [up] by his supervisor, ..."

It also set out the principal findings against him.

The Tribunal has carefully considered that Interim Report and the record of the interview with the Applicant and it is satisfied that there was ample evidence before the BOI to justify its conclusions.

IV. On 10 March 1997, the Deputy Director of UNRWA Affairs requested the BOI to reconvene to confront accused staff members, including the Applicant, with the accusations made against them and to submit a Supplementary Report. On this occasion, because the BOI was aware of a generally dangerous atmosphere in the Tyre area, it did not reveal the names of witnesses when it believed that to do so could jeopardise their safety. It used names only when such persons were already identified. The reconvened BOI met on 17 and 18 March 1997 and furnished its Supplementary Report to the Respondent on 15 April 1997.

V. In its Supplementary Report, the BOI included a summary of the allegations against the Applicant as well as a record of the interview with the Applicant. The Tribunal is satisfied that on this occasion, although some additional allegations were presented to him, he was furnished with sufficient information to understand their nature and was in a position to rebut them adequately. Documents were put to him, he was queried as to signatures on those documents and his evidence and explanations were recorded.

In the Supplementary Report, the BOI concluded that in so far as the Applicant was concerned no new facts were adduced to cause it to alter its earlier opinion. The Tribunal is satisfied that the BOI's conclusion was justified.

VI. On 7 May 1997, the Respondent wrote to the Applicant enclosing extracts from the BOI's reports, including its findings and conclusions. He noted that the BOI had arrived at its findings of the Applicant's misconduct having carefully assessed and weighed the testimony of witnesses, the testimony of the Applicant, and the relevant documentary evidence. He concluded, given the severity of the Applicant's misconduct, that he had to terminate the Applicant's services with the Agency, for misconduct, effective 12 May 1997 at close of business, under the provisions of Area staff regulation 10.2. Again, the Tribunal is satisfied that, based on the BOI reports, the Respondent was justified in terminating the Applicant's services.

VII. The Applicant lodged an appeal with the JAB against the termination claiming, among other things, that he had not been afforded his "due process rights" in the proceedings before the BOI for

the following reasons: He had not been afforded an adequate opportunity to defend against the charges of misconduct before the BOI because the nature of those charges was too unspecific and lacking in detail; he had not been provided sufficient information as to the nature of the evidence which had been given against him and the identity of a number of those witnesses had been withheld.

He further contended that his "due process rights" before the JAB were not adequately protected since he still lacked basic information, had not been furnished with the complete Reports of the BOI and the extracts furnished to him were inadequate to enable him to process properly his appeal to the JAB.

VIII. Whereas the Tribunal accepts that an amount of "detail" had been kept from the Applicant in the course of the BOI investigation because of the Administration's concern for the safety of witnesses and because of the unwillingness of such witnesses to have their identities revealed because they feared reprisals, the Tribunal is satisfied that this did not unreasonably deny the Applicant "due process".

IX. When substantial grounds exist for believing that the disclosure of witnesses' identities would endanger them, the Tribunal finds that it is reasonable to protect the anonymity of such witnesses, provided that in so doing, the person accused would still have sufficient information to address meaningfully the allegations made against him. Obviously there are cases in which it is essential for the accused person to know the source of the allegations against him in order to enable him to challenge the honesty, reputation or reliability of a witness. There are also cases in which a witness must be identified so as to afford "due process" to a person with an alibi or a similar defence. In such cases the Tribunal is satisfied that the rights of an accused person to a fair hearing are superior to those of a person seeking anonymity. Under those circumstances the matter should proceed unless there is disclosure of the identity of the accuser or witness as the case may be.

X. The Tribunal is satisfied that no such circumstances, as outlined above, are apparent here. The accused was afforded a proper and reasonable opportunity to deal with the charges of misconduct in the course of the investigation by the BOI, notwithstanding that certain of the names of the

witnesses were withheld from him and notwithstanding that he was given limited "extracts" from testimony rather than the full unedited records.

XI. The JAB's report stated that it "examined all documents cited before it". It concluded that the Administration had acted within the framework of standing Regulations and Rules without the interference of prejudice or any other extraneous factors and recommended unanimously that the Administration's decision be upheld and that the case be dismissed.

It appears from the record that the Respondent "was unable to disclose the witness statements because of a danger to the security of the witnesses concerned. The principal witnesses at the time had been contacted for permission to release their statements and each witness requested that his or her statement be withheld for his/her own protection." The Tribunal has accordingly carefully considered the information which was considered by the JAB with a view towards examining whether the JAB had before it sufficient material to allow it to discharge its functions under the relevant Staff Regulations and Rules. The Tribunal sought further information in relation to this aspect of the case and further information has been provided. It has examined the entirety of the JAB file. The Tribunal notes the Respondent's position on the record as follows:

"The Administration considers there is ample support for the findings of the Board of Inquiry in the witness statements collected during the extensive investigations. However, the Administration is unable to disclose these statements because of a real danger to the security of the witnesses concerned. The principal witnesses have been contacted for permission to release their statements to the Appellant for the purposes of the deliberations of the Joint Appeals Board, however, each witness requested his/her statement to be withheld for his/her own protection. The attention of the Joint Appeals Board is drawn to the opening paragraphs of the Board of Inquiry's supplemental report of 15 April 1997 (...) where it is stated that '[f]acing the generally dangerous atmosphere in the Tyre Area, the Board could not spell out names of witnesses as this could jeopardise the safety of some of them'. The danger to the personal security of the witnesses, which would result from releasing the witness statements has also been confirmed by the Field Administration Officer, Lebanon (...). Nevertheless, the Administration submits that the Board of Inquiry, having heard the oral evidence and having seen the witnesses giving such evidence, was best placed to make assessments of credibility and weight and the Joint Appeals Board should defer to its judgement and findings on the merits."

XII. The Tribunal must consider whether there was sufficient information before the JAB for it to have adequately reviewed the evidence which had been considered by the BOI and to make its independent assessment of that evidence in order to ascertain if it was adequate to support the findings of the BOI.

The Tribunal is satisfied that the proceedings of the BOI were fair and that the Applicant's rights to due process were respected, notwithstanding that the identity of many of the witnesses had been kept from him. However, the Tribunal is concerned that there was not sufficient material placed before the JAB to enable it to have discharged its duties and obligations in a proper and appropriate manner and is further concerned with the manner in which the JAB actually approached the hearing and consideration of the Applicant's appeal.

There is nothing contained in the report of the JAB that demonstrates that it had addressed the issues which arose in the proceedings before it. It may well be that there is merit in the Applicant's contention that the JAB had gone through the motions of a hearing but had paid only lip service to its duties and obligations in that regard.

The Tribunal agrees with the Applicant's contention in so far as there is nothing in the report of the JAB that suggests the JAB ever dealt with the real issues. The formulaic and arid language used in the JAB's report suggests that it failed to take cognizance of its obligations to review the matters giving rise to the appeal before it and to make its recommendations in a rational and a transparent way.

XIII. The Tribunal holds that the Applicant was not only entitled to a fair and proper hearing before the BOI, but also was entitled to similar consideration before the JAB. The Tribunal is wholly unconvinced that the Applicant was afforded due process or proper consideration in the proceedings before the JAB. Accordingly his rights to a proper hearing and an appropriate and proper review by the JAB were not vindicated.

XIV. The Tribunal considers that the JAB did not have sufficient information to carry out a proper and independent assessment of the proceedings and findings of the BOI. It had before it only "extracts", rather than the full testimonies. These by themselves did not contain sufficient information to support all of the BOI's findings adverse to the Applicant. The JAB which should

have considered the Applicant's complaints that he was not afforded due process clearly failed to consider them at all. In spite of its conclusion that the Agency "in deciding to terminate the Applicant's services had acted within the framework of standing Regulations and Rules without prejudice or other extraneous factor", the JAB clearly never dealt with the issues which were central to the Applicant's appeal.

XV. It is clear to the Tribunal that, whilst the BOI had considered the evidence and made value judgements where there was conflict as to who should be believed and who should not, no meaningful analysis of the BOI's work could have been or was carried out by the JAB as it did not have before it sufficient information.

The Tribunal is satisfied that the proceedings before the BOI afforded the Applicant with such information as was permissible in the light of the concerns expressed for the safety of witnesses and were sufficient to vindicate the Applicant's due process rights, limited as they were by the constraints or needs for protecting the witnesses' safety. The Tribunal is however not satisfied that such rights were adequately vindicated by the Respondent or by the JAB in the course of the JAB proceedings.

XVI. Since the Respondent's decision to terminate the Applicant's services for misconduct was based on the findings of the BOI rather than on the recommendations of the JAB, (which in any event recommended that the Respondent's said decision be upheld) the Tribunal is satisfied that this decision was made validly. Although the Tribunal finds that the Applicant was not afforded due process and fair procedures before the JAB, it considers that the shortcomings in the JAB's proceedings have been fully redressed by the Tribunal's reconsideration of the entire proceedings. Therefore, the Tribunal is satisfied that these shortcomings did not result in any loss or damage to the Applicant.

XVII. In view of the foregoing, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Vice-President

New York, 21 November 2000

Maritza STRUYVENBERG
Executive Secretary

* * *

DISSENTING OPINION BY MR. KEVIN HAUGH

I agree with the judgement of the Tribunal save that I consider the Applicant should be awarded compensation for the violation of his right to have had a meaningful review of his appeal by the JAB. This was rendered impossible by reason of the Administration's unwillingness to furnish to the JAB such information and documents as were necessary for a meaningful review of his case. I would consider appropriate compensation to be three months net base salary as of the date of his dismissal.

(Signatures)

Kevin HAUGH
Member

New York, 21 November 2000

Maritza STRUYVENBERG
Executive Secretary



Administrative Tribunal

Distr.
LIMITED

AT/DEC/984
21 November 2000

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 984

Case No. 1067: ABU ALI

Against: The Commissioner-General
of the United Nations
Relief and Works Agency
for Palestine Refugees
in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Julio Barboza, Vice-President; Mr. Kevin

Haugh;

Whereas, on 1 February 1999, Ali Ibrahim Abu Ali, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA or the Agency), filed an application containing pleas which read as follows:

"SECTION II. PLEAS

Applicant prays the esteemed Tribunal to ...:

- a. [Rescind the] contested decision and [reinstate the] Applicant to his post.
- b. [Consider the] period of cessation as special leave with full pay.
- c. [Compensate] the Applicant for the damage and injury sustained.
- d. [Pay] counseling and secretarial and transport expenses estimated at US\$ 800."

Whereas the Respondent filed his answer on 30 November 1999;

Whereas, on 6 July 2000, the Applicant filed an additional document;

Whereas, on 7 July 2000, the Tribunal put questions to the Respondent;

Whereas, on 20 July 2000, the Respondent produced certain confidential documents requested by the Tribunal and asked that they not be transmitted to the Applicant in order to protect the identity of the witnesses;

Whereas, on 7 August 2000, the Tribunal put questions to the Applicant and to the Respondent;

Whereas, on 8 August 2000, the Tribunal informed the parties that it had decided to adjourn consideration of the case until its next session;

Whereas, on 7 September 2000, the Respondent provided answers to the questions put by the Tribunal on 7 August 2000;

Whereas, on 15 October 2000, the Applicant provided answers to the questions put by the Tribunal on 7 August 2000;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 1 January 1985 as an Area staff member, with the title of Welfare Worker, grade 7, Tyre Area Office, South Lebanon, on a twelve-month fixed-term appointment. On 1 January 1987, he received a temporary indefinite appointment. On 1 November 1987, he was reassigned to the post of Area Welfare Officer, grade 8. Effective 1 April 1995, his post was reclassified to Area Relief and Social Services Officer, grade 11. The Applicant was retroactively promoted to grade 10 effective 1 January 1994, and promoted to the full grade of the post (grade 11) on 1 April 1995. The Applicant was separated from service effective 12 May 1997.

On 5 February 1996, the Director, UNRWA Affairs, convened a Board of Inquiry (BOI) on 24 October 1995, to investigate alleged irregularities in connection with the distribution of commodities, at Jal El Bahr, Tyre Area.

On 11 November 1996, the BOI submitted a report to the Director, UNRWA Affairs, which included a number of serious allegations against the Applicant. The BOI found, among other things,

that the Applicant had arranged for an attack on a key witness, had become involved in a cover-up of the death of a refugee and had concealed serious misconduct of a member of his staff. The BOI reconvened, at the request of the Director, UNRWA Affairs, on 17 and 18 March 1997, in order to "confront accused staff members with the accusations". The Applicant was charged with the following ten allegations: forgery of ration coupons; manipulation of files requested by the BOI; using an Agency vehicle for personal business; favouritism towards his relatives in granting Special Hardship Cases (SHC) and special support projects; false registration of a deceased person as an SHC; an attempt to cover up the death of the aforementioned deceased; improperly contacting witnesses; attempting to destroy files during the inquiry; arranging a physical attack against a witness; and covering up the wrongdoings of his subordinate.

The BOI submitted a supplementary report on 15 April 1997 which not only confirmed the earlier charges but found that he had indeed tampered with witnesses, attempted to cover up the death of the refugee, attempted to destroy files in order to conceal evidence, approved and covered up the wrongdoing of his subordinate and arranged for the attack on the witness.

The Director, UNRWA Affairs, informed the Applicant by a memorandum dated 7 May 1997, that, based on the BOI's findings, he had decided to terminate the Applicant's services for misconduct pursuant to Area staff regulation 10.2, effective 13 May 1997.

On 6 June 1997, the Applicant requested the Director, UNRWA Affairs, to review his decision and on 12 June 1997, the Director, UNRWA Affairs, informed the Applicant that his decision would not be changed.

On 10 July 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB submitted its report on 30 June 1998. Its evaluation, judgement and recommendation read as follows:

"III. EVALUATION AND JUDGEMENT

15. ...

- (a) The Board noted that the termination of the Appellant's appointment was properly made in accordance with Area Staff [Regulations and Rules].

(b) In this context, the Board believes that the Administration has acted within the framework of standing [Regulations and Rules] without the interference of prejudice or any other extraneous factors.

IV. RECOMMENDATION

16. In view of the foregoing and without prejudice to any further oral or written submission to any party, the Board unanimously makes its recommendation to uphold the Administration's decision appealed against and that the case be dismissed."

On 6 August 1998, the Commissioner-General transmitted a copy of the JAB report to the Applicant and informed him as follows:

"...

I have carefully reviewed the Board's report and noted its conclusions. The Board noted that the termination of your appointment was properly made in accordance with Area Staff [Regulations and Rules], and opined that this action was taken without the interference of prejudice or any other extraneous factors. Accordingly, the Board unanimously recommended to uphold the decision to terminate your appointment.

I accept the Board's recommendation. Your appeal is dismissed."

On 1 February 1999, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The BOI investigation was incomplete and prejudicial and violated due process. The Applicant was not permitted the opportunity to confront and examine a number of key witnesses.
2. The JAB was provided only with extracts of the BOI reports and therefore did not give the case a proper hearing. It failed to exercise its duties and obligations in that regard.
3. The Respondent's decision to terminate the Applicant's services for misconduct was arbitrary and without legal or factual foundation.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's services for misconduct fell within the discretionary powers of the Commissioner-General.
2. The Respondent's decision to terminate the Applicant's services for misconduct was correct, not motivated by any improper motive and supported by evidence.

The Tribunal, having deliberated from 5 July to 2 August 2000 in Geneva and from 31 October to 21 November 2000 in New York, now pronounces the following judgement:

I. Following the distribution of commodities on 24 October 1995 at Jal El Bahr in the Tyre area, allegations of irregularities involving certain staff members were brought to the attention of the Administration. In consequence, the Director of UNRWA Affairs, Lebanon, established a BOI to investigate the alleged irregularities and to report thereon, and on any non-compliance found with Agency Rules, Regulations and Norms.

II. On 11 November 1996, the BOI submitted to the Respondent what could be best described as an Interim Report. The BOI identified ten allegations made against the Applicant which were considered both sufficiently serious and substantiated to warrant being put to the Applicant in greater detail. In that Interim Report the BOI listed in the form of a précis some of the allegations which some witnesses had made concerning the Applicant. It did not in each instance identify by name the persons who had made those allegations and only identified persons by letters or numbers.

The Interim Report further contained a record of the BOI's interview of the Applicant on 26 February 1996. It appears therefrom that he had been questioned regarding only some of the allegations which had been made against him.

In its Report, the BOI also found that the Applicant had arranged for an attack on a key witness, that he was implicated in a cover-up of the death of a named and identified refugee to whom a special support project had been awarded after her death, and that he had knowledge of and concealed certain wrongdoings on the part of one of his subordinates.

III. After the release of the Interim Report, the BOI was reconvened to afford the Applicant an opportunity to respond to the allegations made against him, and so that the BOI could prepare its Supplementary Report.

IV. It appears from the 15 April 1997 Supplementary Report that the BOI believed that "facing the generally dangerous atmosphere in the Tyre area, [it] could not spell out names of witnesses as this could jeopardize the safety of some of them". The BOI used names only "when it was obvious who had witnessed and the person therefore already was identified".

V. In the Supplementary Report, the BOI confirmed and amplified its earlier findings against the Applicant, but also added new charges. In the opinion of the Tribunal, many of the individual findings made by the BOI adverse to the Applicant confirmed clear and undoubted misconduct.

VI. The Director of UNRWA Affairs, Lebanon, having considered the findings of the BOI as set out in both Reports wrote to the Applicant on 7 May 1997, indicating that the investigations of the BOI had revealed that the Applicant had committed serious misconduct. He enclosed relevant extracts of the BOI's Reports which set out in detail the BOI's unanimous findings of the Applicant's misconduct. He also enclosed copies of the testimony which had been given by the Applicant to the BOI. He concluded that based on the severity of the Applicant's misconduct he had decided to terminate the Applicant's services for misconduct effective 12 May 1997 at close of business.

VII. On 6 June 1997, the Applicant wrote to the Director of UNRWA Affairs, Lebanon, requesting him to review his decision. On 12 June 1997, the Director of UNRWA Affairs, Lebanon, wrote to the Applicant confirming that the said decision was warranted and would not be changed.

VIII. The Applicant submitted his appeal against that decision to the JAB. The JAB stated that it had examined all documents before it and concluded that that the Administration had acted within the framework of standing Regulations and Rules without the interference of prejudice or any other

extraneous factor. It noted that the termination of the Applicant's appointment was properly made in accordance with the Area Staff Regulations and Rules and unanimously recommended to uphold the Administration's decision to dismiss the case.

On 6 August 1998, the Commissioner-General accepted the JAB's recommendation.

IX. The Applicant seeks rescission of the Respondent's decision claiming that the findings of the BOI were "unsubstantiated, premised on mistakes of fact, errors in law, a premeditated preconceived Judgement, and indications of bias and prejudice".

X. Whilst the BOI had put all ten allegations originally identified in its Interim Report to the Applicant, it ultimately made a finding adverse to the Applicant on only six of those allegations.

The Tribunal is satisfied that there was sufficient evidence before the BOI to justify the adverse finding made against the Applicant on those six allegations. The Tribunal is also satisfied that the BOI, the body that had heard the testimony of the witnesses and the Applicant's denials, was accordingly best positioned to make decisions on credibility as it had seen and heard all parties and observed their demeanour. The Tribunal does not consider it appropriate in this case to interfere with the BOI's findings.

XI. As to the contentions that the adverse findings were made as a result of premeditated preconceived judgement and indications of bias and prejudice, the Applicant provides no supporting evidence. Furthermore the Tribunal can find no evidence to support these contentions from examination of any of the documents herein.

XII. The Applicant takes issue with the proceedings before the JAB, on the basis that there is nothing contained in the JAB report to indicate that the JAB dealt with any of the real issues before it and that it had merely gone through the motions of giving the case a hearing and had paid no more than lip service to its duties and obligations in that regard.

XIII. The Tribunal agrees that the format and content of the JAB report is wholly unsatisfactory, since it does not contain any reference to having investigated the issues properly or at all and contains merely formulaic type recitations. Be this as it may, the Tribunal does not consider that it would be appropriate to interfere with the decision made by the Respondent to terminate the Applicant's services for misconduct on that ground, as the matters relied upon by the Respondent in making that decision were the findings of the BOI and not the recommendation of the JAB. The Tribunal deplores reports written in such formulaic and arid language and wishes to remind appeals boards that their recommendations are subject to review. Such review is very difficult when the written report fails to disclose how the appeals board dealt with issues and what facts they found to support their recommendations.

XIV. The Tribunal is concerned with whether the Applicant had been afforded fair procedures by providing him with sufficient information as would have enabled him to understand the charges of misconduct made against him and from responding adequately thereto. The Tribunal accordingly sought further information concerning these aspects of the proceedings from both parties and received their responses. The Tribunal has obtained the full record of the proceedings both of the BOI and of the JAB and considered those records carefully. The full records are not being made available to the Applicant because of the concerns for their safety and well-being expressed by some of the witnesses who gave evidence to the BOI.

XV. Having carefully considered the record of the BOI and the various submissions and other documents, the Tribunal is satisfied that the nature and detail of the allegations of misconduct investigated by the BOI were made known to the Applicant prior to his being called upon to respond to same, as was the nature and detail of the evidence said to have supported those allegations. The Tribunal is also satisfied that the Applicant was provided with sufficient information concerning those charges necessary to have enabled him to respond to them in a meaningful way and is satisfied that he was afforded due process.

XVI. The Applicant had prior to the commencement of the proceedings before the JAB sought copies of all documents arising from the inquiry of the BOI, including its full Report. The Head, Area Personnel Section, UNRWA Headquarters, Gaza, informed the Applicant that "it has been determined that there is a real and apparent danger to the personal security of the witnesses who gave testimony to the BOI should transcripts of those testimonies be released. As a result I am authorized on behalf of the Administration to inform you that it has been decided not to provide you with those testimonies".

The Tribunal notes the Respondent's position on the record as follows:

"21. The two Board of Inquiry reports covered the investigation into allegations against four Area staff members and the Administration has released to the Appellant all relevant sections of the two Board of Inquiry reports relating to the Appellant. The Administration considers there is ample support for the findings of the Board of Inquiry in the witness statements collected during the extensive investigation. However, the Administration is unable to disclose these statements because of a real danger to the security of the witnesses concerned. The principal witnesses have been contacted for permission to release their statements to the Appellant for the purposes of the deliberations of the Joint Appeals Board, however, each witness requested his/her statement to be withheld for his/her own protection. The attention of the Joint Appeals Board is drawn to the opening paragraphs of the Board of Inquiry's supplemental report of 15 April 1997 (...) where it is stated that '[f]acing the generally dangerous atmosphere in the Tyre Area, the Board could not spell out names of witnesses as this would jeopardise the safety of some of them'. In addition, it should be noted that one of the witnesses who gave evidence before the Board of Inquiry was assaulted in the presence of the Appellant soon after giving his testimony (...). The danger to the personal security of the witnesses, which would result from releasing the witness statements has also been confirmed by the Field Administration Officer, Lebanon (...). Nevertheless, the Administration submits that the Board of Inquiry, having heard the oral evidence and having seen the witnesses giving such evidence, was best placed to make assessments of credibility and weight and the Joint Appeals Board should defer to its judgement and findings."

XVII. The Tribunal also must consider whether there was sufficient information before the JAB for it to have adequately reviewed the evidence which had been considered by the BOI and to make its independent assessment of that evidence in order to ascertain if it was adequate to support the findings of the BOI.

The Tribunal is satisfied that the proceedings of the BOI had been fair and that the Applicant's rights to due process were respected, notwithstanding that the identity of many of the witnesses had been kept from him. The Tribunal is satisfied that the proceedings before the BOI afforded the Applicant with such information as was permissible in the light of the concerns expressed for the safety of witnesses and were sufficient to vindicate the applicant's due process rights, limited as they were by the constraints or needs for protecting the witnesses' safety. The Tribunal is however not satisfied that such rights were adequately vindicated by the Respondent or by the JAB in the course of the JAB proceedings. However, the Tribunal is concerned that there was not sufficient material placed before the JAB to enable it to have discharged its duties and obligations in a proper and appropriate manner and is further concerned with the manner in which the JAB actually approached the hearing and consideration of the Applicant's appeal.

XVIII. There is nothing contained in the report of the JAB which demonstrates that it had addressed the issues which arose in the proceedings before it and it may well be that there is merit in the Applicant's submission that it had done no more than go through the motions. The Tribunal notes that the Applicant was not only entitled to a fair and proper hearing before the BOI, but that he was entitled to similar consideration before the JAB. The Tribunal is wholly unconvinced that the Applicant was afforded due process or proper consideration in the proceedings before the JAB. Accordingly the Tribunal finds that his rights to an appropriate hearing and an appropriate and proper review by the JAB were not vindicated.

XIX. The Tribunal further considers that the JAB had not in any event received sufficient information to enable it to carry out a proper independent assessment of the proceedings and findings of the BOI, had it been prepared to carry out such a review and assessment. It had before it only the "extracts" from the testimonies of witnesses who had given evidence in the course of the BOI's investigations. These by themselves did not contain sufficient information to support all of the adverse findings of the BOI. The JAB, which should have considered the Applicant's complaints that he was not afforded due process, clearly failed to consider them at all. The JAB's conclusion that the Agency "in deciding to terminate the Applicant's services had acted within the framework of standing

Regulations and Rules without prejudice or other extraneous factor" clearly never dealt with the issues which were central to the Applicant's appeal.

XX. Although the Tribunal finds that the Applicant was not afforded due process and fair procedures before the JAB, it considers that the shortcomings in its proceedings have been fully redressed by the Tribunal's reconsideration of the entire proceedings. Therefore, the Tribunal is satisfied that these shortcomings did not result in any loss or damage to the Applicant.

XXI. In view of the foregoing, the Tribunal rejects the application in its entirety.

(Signatures)

Hubert THIERRY
President

Julio BARBOZA
Vice-President

New York, 21 November 2000

Maritza STRUYVENBERG
Executive Secretary

* * *

DISSENTING OPINION BY MR. KEVIN HAUGH

I agree with the judgement of the Tribunal save that I consider the Applicant should be awarded compensation for the violation of his right to have had a meaningful review of his appeal by the JAB. This was rendered impossible by reason of the Administration's unwillingness to furnish to the JAB such information and documents as were necessary for a meaningful review of his case. I would consider appropriate compensation to be three months net base salary as of the date of his dismissal.

(Signatures)

Kevin HAUGH
Member

New York, 21 November 2000

Maritza STRUYVENBERG
Executive Secretary